85-236

NO.

Supreme Court, U.S.
FILED
AUG 3 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

1985 Term

HARRY W. EICHENLAUB,

Petitioner

v.

DAVID ALAN YURKY,

Respondent

PETITION FOR A WRIT OF CERTIORARI AND APPENDIX TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

JOHN C. YOUNGMAN, JR.
Counsel of Record
CANDOR, YOUNGMAN, GIBSON & GAULT
23 West Third Street
P.O. Box 1507
Williamsport, PA 17703-1507
(717) 322-6144

---

60 RP

QUESTION PRESENTED

Does due process require a hearing before an independent tribunal for a pretrial detainee transferred from a County prison to a State correctional institution on the basis of an emergency transfer as a security risk?

PARTIES TO THE PROCEEDING

The Respondent and Petitioner are named in the caption of this case. In addition, the Defendants, Mr. Zimmerman, Warden SCI at Huntingdon, Pennsylvania and Mr. Wicker, Deputy Superintendent SCI at Huntingdon, Pennsylvania are employees of the Commonwealth of Pennsylvania, Bureau of Corrections.

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	2
STATEMENT OF THE CASE	
A. STATEMENT OF JURISDICTION IN THE COURT OF FIRST INSTANCE	2
B. THE FACTS	3
SUMMARY OF ARGUMENT	6
ARGUMENT	
I. No hearing before an independent tribunal must be accorded a pretrial detainee transferred as a security risk from a County prison to a State correctional institution in an emergency situation where the detainee had general notice of the reason for the transfer and had effective assistance of counsel	6
II. Plaintiff suffered no loss of procedural due process, since he was afforded that due process to which he was entitled	9

Page

A. The case of Cobb v. Aytch, 643 F2d 946 (C.A. 3, 1981) is distinguishable on its facts 10

B. Yurky was provided with procedural due process in the sense required by Hewitt v. Helms, 459 U.S. 460, 103 S. Ct. 864, 74 L. Ed. 2D 675 (1983) 14

TABLE OF AUTHORITIES

	Page
CASES	
Bell v. Woolfish, 441 U.S. 520, 60 L. Ed. 99 Supreme Ct. 1861, 60 L. Ed. 2d 447 (1979)	7
Cobb v. Aytch, 643 F.2d 946 (C.A. 3 1981)	8,10 11,13 13,14 16,19
Hewitt v. Helms, _____U.S._____, 103 S. Ct. 864, _____L. Ed. 2d_____ (1983)	7,14 15,18 19
Jones v. Mabry, 723 F.2d 590 (C.A. 8 1983)	9
Montanye v. Haynes, 427 U.S. 236, 96 S. Ct. 2543, 49 L. Ed. 2d 446 (1976)	8
Olium v. Wakinekona, 103 S. Ct. 1741 (1983)	9
STATUTES	
28 United States Code, §1343	2

NO.

IN THE SUPREME COURT OF THE UNITED STATES
1985 Term

HARRY W. EICHENLAUB,
Petitioner

v.

DAVID ALAN YURKY,
Respondent

PETITION FOR A WRIT OF CERTIORARI AND APPENDIX TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner, Harry Eichenlaub, an individual, respectfully petitions for a Writ of Certiorari to review the Judgment and Opinion of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The Opinion of the Court of Appeals (Appendix A infra) is not reported. The Opinion of the District Court (Appendix B infra) is also unreported.

JURISDICTION

(1) CONSTITUTIONAL PROVISION INVOLVED

Amendment 14 §1. Citizens of the United States. All persons born or naturalizing.... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within his jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. STATEMENT OF JURISDICTION IN THE COURT OF FIRST INSTANCE

Jurisdiction in the Federal District Court for the Middle District of Pennsylvania arises under 28 United States Code, §1343.

B. THE FACTS

The uncontroverted material facts in this case are that from December 23, 1981, until January 8, 1982, Plaintiff was a pretrial detainee at the Clinton County Jail (CCJ). On January 8, 1982, Plaintiff was transferred to the State Correctional Institution at Huntingdon (SCIH) without being given a hearing wherein he might voice his opposition to said transfer. On his arrival at SCIH, Plaintiff was assigned to Administrative Custody (AC) until such time as he could be taken in front of the Program Review Committee (PRC). This was accomplished on January 11, 1982. The PRC's determination at that time was that, pending a chance to gather more information about the Plaintiff, he should remain in AC. Plaintiff did, in

fact, remain in that mode of custody until February 9, 1982. During the time he was in AC, Plaintiff Yurky had all the access to his attorneys permitted by Bureau of Corrections (BOC) regulations. Over three months elapsed from the time Plaintiff was released from General Population (GP) to the time (May 19, 1982) that his trial began. During all relevant times Defendant Eichenlaub was the Warden of CCJ, Defendant Wicker was Deputy Superintendent at SCIH and Defendant Zimmerman was Warden of SCIH.

In addition, the Affidavit of Harry W. Eichenlaub filed with his Brief in the Court below as Exhibit "1" avers that following additional facts:

1. Eichenlaub was informed by Deputy Commissioner Deremus on January 8, 1982, that inasmuch as this was an

emergency transfer, "we'll (prison officials) have a hearing later."

2. Clinton County Jail was and is a minimum security institution, as is Centre County Jail.

3. On May 19, 1982, Plaintiff began trial on the robbery, conspiracy, and criminal complicity actions. On May 19, 1982, he was convicted of these crimes and is presently serving a sentence at SCI-H.

4. All of the allegations of Plaintiff's Complaint alleging deprivation of constitutional rights and right to any kind of liability are denied by Defendant Eichenlaub's Answer.

5. Eichenlaub received permission to transfer Plaintiff to SCI-H while Plaintiff was at a Preliminary Hearing at State College, Pennsylvania.

6. Eichenlaub harbors no ill will toward the Plaintiff, and at all times, he has acted the good faith belief that his actions were lawful.

Appellant Yurky was aware of his bail being raised to $300,000.00 and was aware of the condition existing at Clinton County Jail.

SUMMARY OF ARGUMENT

No hearing before an independent tribunal must be accorded a pretrial detainee transferred as a security risk from a County prison to a State correctional institution in an emergency situation where the detainee had general notice of the reason for the transfer and had effective assistance of counsel.

ARGUMENT

I. NO HEARING BEFORE AN INDEPENDENT TRIBUNAL MUST BE ACCORDED A

PRETRIAL DETAINEE TRANSFERRED AS A SECURITY RISK FROM A COUNTY PRISON TO A STATE CORRECTIONAL INSTITUTION IN AN EMERGENCY SITUATION WHERE THE DETAINEE HAD GENERAL NOTICE OF THE REASON FOR THE TRANSFER AND HAD EFFECTIVE ASSISTANCE OF COUNSEL.

This Court has delineated the type of process due a pretrial detainee in Bell v. Woolfish, 441 U.S. 520, 60 L. Ed. 99 Supreme Ct. 1861, 60 L. Ed. 2d 447 (1979). In addition, this Court has delineated the kind of process due persons in prison in Hewitt v. Helms, _____ U.S._____, 103 S. Ct. 864, _____L. Ed. 2d_____ (1983). The District Court held that the due process given Respondent in this case was adequate (App. 9b). The Court stated:

> "Plaintiff Yurky was already validly incarcerated. A prima facie case had been found to exist against him and a

> factors approach had dictated that high bail, which Yurky failed to raise, be set."

The prison panel gave Yurky general notice of the reason for the transfer, that is, he was a security risk. Harry Eichenlaub did obtain the Court of Common Pleas approval for the transfer and the record demonstrates that there was a rational basis for the transfer.

The Circuit Court of Appeals held that the case of Cobb v. Aytch, 643 F.2d 946 (C.A. 3 1981) controlled the case at bar and that a hearing before an independent tribunal was required (App. pgs. 8a-12a).

A transfer of a prisoner from one prison to another does not infringe a protected liberty interest, Montanye v. Haynes, 427 U.S. 236, 96 S. Ct. 2543, 49

L. Ed. 2d 466 (1976). This has also been reitterated in the case of Olium v. Wakinekona, 103 S. Ct. 1741 (1983). The Court of Appeals held that Petitioner was not denied the effective assistance of counsel, and has only held with respect to Petitioner that the only thing suffered by Respondent was the lack of a hearing before an independent tribunal. As was stated by this Court in Olium, supra, at 103 Supreme Ct. at 1748, "process is not an end in itself. Its constitutional purpose is to protect a substance of interest to which the individual has a legitimate claim of entitlement." Here, there is no such interest to protect. See also Jones v. Mabry, 723 F.2d 590 (C.A. 8 1983).

II. PLAINTIFF SUFFERED NO LOSS OF PROCEDURAL DUE PROCESS, SINCE HE WAS

AFFORDED THAT DUE PROCESS TO WHICH HE WAS ENTITLED.

A. THE CASE OF COBB V. AYTCH, 643 F.2d 946 (C.A. 3, 1981) IS DISTINGUISHABLE ON ITS FACTS.

In Cobb, the Third Circuit considered, inter alia, whether the transfer of pretrial detainees being held in Philadelphia-area correctional facilities to State institutions implicated a protectible liberty interest which would entitle the detainees to due process in connection with such transfer. That Court concluded, based on the facts of that case, Id. at 960, that a federal liberty interest was involved in such transfers, and the detainees so affected were entitled to a pre-transfer hearing.

The undisputed facts of record established the following: detainees

were transferred sizeable distances (at minimum 90 miles, at maximum 300 miles). Id. at 949. As a result, many transferred detainees were deprived of the assistance of their court-appointed counsel and in some cases missed court appearances and hearings when they were not returned to Philadelphia on time. Id. at 951. Due to ensuing continuances, the pre-trial period of some inmates was prolonged, as was the eventual length of their sentences. Id. Additionally, visits to detainees by family and friends were reduced, presumably due to the increased distance. Id. at 952. In some cases, restrictions were imposed on detainees' mail privileges in State institutes. Id.

As previously mentioned, the Court in Cobb determined that the speci-

fic facts of record implicated the detainees' Sixth Amendment rights to speedy trial and effective assistance of counsel and concluded that a protectible liberty interest was present under such circumstances. A similar conclusion on the facts of this case is not justified.

Yurky's transfer from CCJ to SCIH involved a difference in distance of only approximately 60 miles.[1] At SCIH,

---

[1]The change in Yurky's confinement did not result in sizeable increases in the distance between him and his attorneys. Yurky's attorneys were located in Lock Haven and Bellefonte. See Yurky's Responses to the Commonwealth Defendants' Interrogatories, filed November 18, 1982, at p. 18, no. 17. The Court may take judicial notice of the distances between the following places: between Huntingdon and Lock Haven, approximately 60 miles; between Bellefonte and Huntingdon, 40 miles; and between Lock Haven and Bellefonte, approximately 25 miles. Accordingly, one of Yurky's attorneys (the one in Lock Haven) would have been required to travel only about one hour to

Yurky had adequate means for effectively communicating with his counsel and any other parties with whom he may have chosen to correspond. Likewise, there is nothing of record which indicates that Yurky ever failed to appear in a Court proceeding or that the duration of his pre-trial confinement was increased as a result.

Thus, the bases on which the Cobb Court found its decision were simply not present here, and Yurky cannot successfully assert a protected constitutional interest giving rise to procedural or substantive due process.

---

visit him; the other much less. The attorney in Bellefonte would have to travel 25 miles to visit Yurky at Lock Haven and 40 miles to see him at SCIH, a difference of only about 20 miles. These differences are not comparable to those in Cobb.

B. YURKY WAS PROVIDED WITH PROCEDURAL DUE PROCESS IN THE SENSE REQUIRED BY HEWITT V. HELMS, 459 U.S. 460, 103 S. CT. 864, 74 L. Ed. 2D 675 (1983).

It is submitted that the Cobb v. Aytch procedural requirements set forth in that case, 643 F.2d 946, 957-960, have been modified by the holding in Hewitt v. Helms, supra, as to what procedural due process is due in a prison transfer situation. What Plaintiff was entitled to in order to satisfy the due process clause under the case of Hewitt v. Helsm, supra, is : (1) Some notice of the charges against him; and (2) an opportunity to present his views to the prison officials charged with deciding whether to transfer him to administrative segregation. In the case

at bar, Plaintiff did get some notice of the charges against him (that he was a security risk) by the BC-141D Form given him at the time that he arrived SCIH. Further, Plaintiff had an opportunity on January 11 to present his opposition to the security risk matter to the Program Review Committee, the Committee established by regulation to decide what disposition should be made of an inmate upon his transfer to the institution.

In addition, an inmate must be given an opportunity to present his views to the prison official charged with deciding whether to transfer him to administrative segregation in this case. See Hewitt v. Helms, 103 S. Ct. 864, 874. While Deputy Commissioner Deremus made the decision to allow the transfer of Plaintiff to SCIH, it is submitted that

the PRC Committee is the best instrument for allowing the Plaintiff to present his views to prison officials. Under the administrative regulations, the PRC has primary decision making power on where to place the inmate once he has arrived at the prison (see 37 Pa. Code Section 95.107) and is in a position to make recommendations to the Superintendent of Prisons regarding transfer of inmates. See 37 Pa. Code Section 95.103.

We are concerned in this case with an emergency transfer for security reasons, where it is not necessary to have a hearing prior to transfer. See the regulations themselves and the case of Cobb v. Aytch, 643 F.2d 946 and 960 (C.A. 3, 1981) which recognizes this kind of situation. Although the Affidavit of present acting Commissioner of

Corrections, Jeffes, states that it is the responsibility of transferring County officials to insure any hearing that may have been required in connection with the transfer of the inmate from a County facility to a State facility was held, this is not the Affidavit of the preparer of the memorandum, nor does it meet the emergency situation.

It is submitted that the memorandum governing emergency transfers itself, provides for a hearing before the PRC Committee Subsection III(F) of this memorandum is set forth here in its entirety:

> "Emergency transfers may be approved orally by the Deputy Commissioner with all of the above procedures accomplished after-the-fact. In such cases of dire emergency, the prisoner shall be notified in writing of the transfer including the reason prior to the transfer. The required hearing procedures before the Program Review committee, including 24 hour

> written notice in advance of the hearing shall be accomplished by the receiving institution in a timely manner. The inmate may waive the 24 hour advance notice in writing."

When this section is read with connection with the 24-hour Notice of Hearing provision of III(C)(1), it indicates that the question of who should hold the hearing in the case of an emergency transfer is arguably ambiguous and if clear either way seems to indicate that the hearings shall be held by the PRC Committee.

There is another problem with any argument that the County warden in the emergency transfer situation should be responsible for seeing that the hearing is held. The Helms v. Hewitt case, supra, indicates that the hearing should be held before those responsible for the decision to transfer. Warden

Eichenlaub did not make the decision to transfer--he was powerless to do so. The decision was made by Deputy Commissioner Deremus as provided in III of the Transfer Memorandum. Thus, it is submitted that the hearing should be held by prison officials at the transferee institution within the holdings of Helms v. Hewitt, supra.

While the case of Cobb v. Aytch, supra, did address in a very brief fashion the problem of emergency transfers (see 643 F. 2d 946 at 961 in the context of wording of the injunction), it is to be noted that the proper tribunal question was left open by the Court.

Thus, it is submitted that Plaintiff, in fact, did receive due process concerning his transfer from CCJ to SCIH.

Respectfully submitted,

CANDOR, YOUNGMAN, GIBSON & GAULT

By _____

John C. Youngman, Jr.
ATTORNEY FOR RESPONDENT
23 West Third Street
Williamsport, PA 17701
(717) 322-6144

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 84-5636

YURKY, DAVID ALAN

v.

EICHENLAUB, HARRY, BROWN, CARSON, GILLMORE, DAVID, MR. ZIMMERMAN, Warden, SCIH, MR. WICKER, Deputy Supt. SCIH, PROGRAM REVIEW COMMITTEE OF 1/11 SCIH, TWO UNNAMED CLINTON COUNTY JAIL GUARDS, Lock Haven, Pa.

David Alan Yurky, Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA
(D.C. Civil No. 82-0663)

(District Judge:
Honorable Richard P. Conaboy)

Submitted under Third Circuit Rule 12(6)
March 25, 1985

Before: GIBBONS, SLOVITER and VAN DUSEN, Circuit Judges

(Opinion filed May 10, 1985)

MEMEORANDUM OPINION OF THE COURT

VAN DUSEN, Senior Circuit Judge.

Plaintiff, David Alan Yurky, brought an action under 42 U.S.C. §1983 (1982) seeking monetary and injunctive relief against Defendants, who are officials of the Clinton County (Pennsylvania) Jail (CCJ) and the State Correctional Institution at Huntingdon (SCIH). Plaintiff appeals from a District Court Order granting Defendants' Motion for Summary Judgment. We will vacate the District Court Order in part and remand for further proceedings in accordance with this Opinion.

Plaintiff contends that his pretrial transfer from CCJ to SCIH violated the due process requirements outlined by this Court in Cobb v. Aytch, 643 F.2d 946

(3d Cir. 1981), because he was given neither notice of the transfer nor an opportunity to be heard before a Pennsylvania tribunal independent of the prison system. Plaintiff further contends that his placement in administrative custody -- rather than in the general prison population -- at SCIH violated due process because (a) he had insufficient notice of the charges against him, and (b) he had no meaningful opportunity to present his views to the prison officials charged with deciding whether to place him in administrative custody. See Hewitt v. Helms, 459 U.S. 460 (1983). Plaintiff also contends that he was denied his constitutional right to effective assistance of counsel by his pre-trial confinement at SCIH.

The underlying facts are as follows. On December 23, 1981, Plaintiff was arrested on charges of criminal conspiracy and criminal complicity. The next day he was placed in CCJ to await trial. It was at this time that one of the Defendants, CCJ Warden Harry W. Eichenlaub, was informed by the State Police of Plaintiff's alleged knowledge of the martial arts and alleged connection with the Palestinian Liberation Organization. Defendant Harry Eichenlaub's Answers to Interrogatories of Plaintiff, No. 3 (April 6, 1983). On January 8, 1982, a Friday, Eichenlaub learned from the State Police that Plaintiff allegedly had a passport to Lebanon, that his bail would be increased from $100,000. to $300,000., and that it was likely that the FBI would soon file

bank robbery charges against him. Id. The same day Eichenlaub sought and obtained the oral approval of Erskind Deramos, Deputy Commissioner of the Pennsylvania Bureau of Correction, and Clinton County President Judge Carson V. Brown to the emergency transfer of Plaintiff from CCJ to SCIH, based on the belief that Plaintiff constituted a security risk if he remained at CCJ. Id. at Nos. 5 and 7. Thus, on January 8, Plaintiff was transferred to SCIH, given a BC-141D form, and immediately placed in administrative custody. The BC-141D form indicated that Plaintiff was a security risk and would remain in administrative custody pending review by SCIH's Program Review Committee (PRC). Brief in Opposition to Plaintiff's Motion For Partial Summary Judgment and in Support

of Cross Motion of Defendants Zimmerman and Wicker for Summary Judgment, at Appendix E (Declaration of Benny E. Varner), Exhibit I (April 16, 1984). The space on the BC-141D form which provided for the date of the hearing was not filled in. Id.

On Monday, January 11, 1982, the PRC interviewed Plaintiff and informed him that Federal authorities would soon be taking him for arraignment on bank robbery charges and that he would continue to be confined in administrative custody. Id. at Appendix A (Statement of Terry W. Henry). The PRC's actions that date were based solely on documents prepared in connection with Plaintiff's transfer to SCIH that stated Plaintiff was a security risk. Id. Plaintiff, however, was never informed of the

underlying reasons for the PRC's determination that he was a security risk. Id.

This Court's standard of review of a District Court's grant of Summary Judgment is plenary. Struble v. N. J. Brewery Emp. Welfare Trust Fund, 732 F.2d 325, 330 (3d Cir. 1984). To be granted a Motion for Summary Judgment, the moving party must demonstrate that there exist no material issues of fact and that it is entitled to judgment as a matter of law. Adickes v. Kress & Co., 398 U.S. 144, 157 (1970); Fed. R. Civ. P. 56(c). Moreover, the District Court must draw all inferences from the facts in the light most favorable to the opposing party. United States v. Diebold, Inc., 369 U.S. 654, 655 (1962); Sun Revining and Marketing Co. v. Rago, 741 F.2d 670, 673 (3d Cir. 1984).

I.

In Cobb v. Aytch, 643 F.2d 946 (3d Cir. 1981), this Court stated that the transfer of a pre-trial detainee from a County Correctional facility to a Pennsylvania State Prison implicated a constitutional liberty interest of the detainee and therefore entitled him to due process of law. The Court held in Cobb that, to satisfy the requirements of due process, the State must provide a pre-trial detainee prior notice of the transfer and an opportunity to be heard by a Pennsylvania tribunal independent of the prison system. Id. at 961. If a transfer is necessitated by an emergency, however, "a prompt post-transfer hearing in a Pennsylvania tribunal independent of the prison system" will satisfy due process requirements. Id. Because the

transfer of Plaintiff in this case was the result of a perceived emergency, the failure to provide him prior notice did not constitute a denial of due process.[1]

Nevertheless, we are aware of no evidence in the record to show that Plaintiff was ever given an opportunity to be heard by a Pennsylvania tribunal independent of the prison system after his transfer to SCIH. Plaintiff was

---

1It should be noted, however, that the Bureau of Correction's Directive OM-102 at III-F requires that in "cases of dire emergency, the prisoner shall be notified in writing of the transfer including the reason prior to the transfer." Brief in Opposition to Plaintiff's Motion for Partial Summary Judgment and in Support of Cross Motion of Defendants Zimmerman and Wicker for Summary Judgment, at Appendix F (Declaration of Glen R. Jeffes), Exhibit I (April 16, 1984). Thus, it seems that the transfer here violated the Bureau of Correction's own procedures.

given a hearing before the Program Review Committee at SCIH. Yet, the Committee consists of officers of the prison and thus cannot be characterized as a tribunal independent of the prison system.[2] Therefore, the record indicates that Plaintiff was not afforded the due process protections to which a pre-trial detainee is entitled when being transferred from a County Jail to a State Correctional Institution.

Moreover, it was Defendant Eichenlaub who was responsible for ensuring that Plaintiff received his due process protections. Eichenlaub was the

---

[2]The Court in Cobb suggested that an appropriate tribunal for transfer hearings was the Pennsylvania Court of Common Pleas, but that other independent tribunals may be more appropriate. Cobb v. Aytch, 643 F.2d 946, 961 (3d Cir. 1981).

person who possessed the information that served as the basis for the transfer and who sought to deprive Plaintiff of his liberty interest in remaining in the County Jail. Under the then-prevailing Pennsylvania Bureau of Correction operating procedures, County, rather than State, officials were responsible for ensuring that any due pro cess requirements relating to the transfer of inmates from County facilities were satisfied. Brief in Opposition to Plaintiff's Motion for Partial Summary Judgment and in Support of Cross Motion of Deendants Zimmerman and Wicker for Summary Judgment, at Appendix F (Declaration of Jeffes at ¶ 7) (April 16, 1984). The same obligation exists in cases of emergency transfers. Id. at ¶ 8. Therefore, we conclude, as a matter of

law, that the District Court erred in granting Eichenlaub's Motion for Summary Judgment on the issue of whether he satisfied the requirements of due process arising from the transfer of Plaintiff from CCJ to SCIH. Accordingly, we will vacate the portion of the District Court's Order which grants Defendant Eichenlaub's Motion for Summary Judgment regarding this issue.

Nevertheless, we will affirm the District Court's grant of Summary Judgment in favor of Defendants Charles Zimmerman and Emanuel Wicker regarding this claim. Neither Zimmerman nor Wicker -- both of whom were officials at SCIH -- had the authority to deny the entry into their prison of an inmate, such as Plaintiff, whose transfer was approved by the Deputy Commissioner of Correction.

Moreover, they do not have the responsibility of satisfying the due process requirements arising from a transfer of an inmate from a County Jail to their prison. Thus, they cannot be held responsible for the failure of CCJ officials to grant Plaintiff a hearing either before or after his transfer from CCJ to SCIH.

II.

In Hewitt v. Helms, 459 U.S. 460 (1983), the Supreme Court held that, given the existence of extensive regulations in Pennsylvania regarding the confinement of a State prisoner in administrative segregation, duly convicted and sentenced inmates of Pennsylvania State prisons had a constitutionally protected liberty interest in remaining in the general prison popula-

tion. 459 U.S. at 470-71. This Court has held that such an interest also applies to inmates who are pre-trial detainees. Drayton v. Robinson, 719 F.2d 1214, 1218 (3d Cir. 1983).

According to the Court in Hewitt, in order to confine an inmate in administrative segregation, the State must provide him an informal, non-adversarial, evidentiary review. Hewitt v. Helms, 459 U.S. 460, 476 (1983). The inmate must also receive "some notice" of the reasons for his confinement and an opportunity to present his views to the prison official who determines whether or not to confine him. Id. Ordinarily a written statement submitted by the inmate is sufficient. Id. If these procedures are followed and the decision makers review the reasons for confinement with

the then-available evidence, due process is satisfied. Id. The District Court held, in granting the Motion for Summary Judgment in Defendants Zimmerman and Wicker, that Defendants had satisfied the due process requirements outlined in Hewitt when they placed Plaintiff in administrative custody at SCIH.

The notice given to the inmate in Hewitt -- and held sufficient by the Court -- was a report which "briefly described the factual basis for the charge and contained a lengthy recitation of the procedures governing the institution's disciplinary hearing." 459 U.S. at 464. By contrast, in this case, Plaintiff was given a BC-141D form which merely stated "security risk" and informed him only that he would be held in administrative custody until a hearing

was held by the PRC.[3] Moreover, the inmate in Hewitt admitted that he had an opportunity to present his version of the facts, 459 U.S. at 477, whereas Plaintiff in this case was given little idea by the phrase "security risk" as to what charges he had to defend against. Thus, the record indicates Plaintiff had no meaningful opportunity to present his position. As such, we conclude on this record, as a matter of law, that the District Court erred in holding in its grant of Summary Judgment that the

---

[3]Although the BC-141D form had spaces in which to write the date, time, and location of the hearing, these spaces were not filled in. Thus, it appears that Plaintiff did not receive the 24-hour written notice of hearing required by the Bureau of Correction's Directive OM-102 at III-F. Nor does it appear from the record that Plaintiff ever waived this notice.

requirements of due process specified by Hewitt were satisfied by Defendants when they placed Plaintiff in administrative custody at SCIH. Accordingly, we will vacate that portion of the District Court's Order granting the Motion for Summary Judgment on this claim made by Defendants Zimmerman and Wicker.

III.

Finally, we hold that the District Court properly granted Defendants' Motion for Summary Judgment as to Plaintiff's final claim because the evidence in the record demonstrates, as a matter of law, that Plaintiff was not denied his right to effective assistance of counsel. Plaintiff was able to effectively communicate which his attorneys during his pre-trial confinement at SCIH.

During his 30-day stay in administrative custody, Plaintiff was permitted to make two phone calls. Thee is no evidence that any emergency arose requiring him to speak with his attorneys at a time in which he did not have access to a telephone. Moreover, the record indicates Plaintiff could freely communicate, by mail, with his attorneys during his pre-trial confinement, even if his monthly allotment of free postage had been exhausted and he was without funds. Finally, Plaintiff's attorneys were free to visit him at the prison. Accordingly, we will affirm that portion of the District Court's Order granting Summary Judgment for Defendants on this claim.

IV.

In summary, we will vacate the District Court's Order granting Defendant

Eichenlaub's Motion for Summary Judgment regarding the claim arising from Plaintiff's transfer to SCIH, but we will affirm the grant of the Summary Judgment Motion by Defendants Zimmerman and Wicker with respect to this claim. We will vacate the District Court's Order granting the Summary Judgment Motion by Wicker and Zimmerman regarding the claim arising from Plaintiff's placement in administrative custody at SCIH. Finally, we will affirm the Court's grant of Defendants' Motion for Summary Judgment on Plaintiff's right-to-effective-assistnce-of-counsel claim. Accordingly, we will remand this case to the District Court for its determination of whether to grant Plaintiff's Motion for Partial Summary Judgment and/or whether to hold a trial on any of the issues raised in the

pleadings, such as issues of liability, qualified immunity, and damages.

_____

Francis L. Van Dusen
Circuit Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

DAVID ALAN YURKY	:	
	:	
Plaintiff	:	
	:	
	:	CIVIL NO. 82-0663
	:	
HARRY W. EICHENLAUB, et al.	:	
	:	
	:	
Defendants	:	

MEMORANDUM AND ORDER

We consider here cross Motions for Summary Judgment filed pursuant to a pro se civil rights action based upon 42 U.S.C. §1983. We reviewed Plaintiff's financial status, granted his request to proceed in forma pauperis and ordered service of process. Plaintiff Yurky has moved only for a partial Summary Judgment based on his belief that one of his claims is not susceptible to summary

disposition. We find, however, that each of Plaintiff's claims may be so adjudicated.

In the case of a Summary Judgment Motion, the burden is on the moving party to demonstrate that he is entitled to Summary Judgment as a matter of law and that no material issues of relevant facts exist. Aidckes v. S.H. Kress & Co., 398 U.S. 144 (1970). Further, all matters presented with reference to the motion must be looked at in a light most favorable to the opposing party. U.S. v. Diebold, 309 U.S. 654 1962).

Section 1983 creates a remedy for conduct which: (1) was committed by a person acting under color of State law; and (2) deprived a Plaintiff of a right, privilege or immunity secured by the

Constitution or laws of the United States (hereinafter referred to as a "federally protected right"). Parratt v. Taylor, 451 U.S. 527, 535, 101 S. Ct. 1908, 1913, 68 L. Ed. 2d 420, 428 (1981).

In order for relief to be granted against a Defendant pursuant to Section 1983, that Defendant must have actually participated in, or had actual knowledge of and acquiesced in, the conduct which resulted in a violation of the Plaintiff's federally protected right. Relief cannot be granted against a Defendant pursuant to Section 1983 based solely upon the theory of respondeat superior or the fact the Defendant was the supervisor or superior of the person whose conduct actually deprived the Plaintiff of one of his federally protected rights under color of State law.

Hampton v. Holmesburg Prison Officials, 546 F. 2d 1077 (3d Cir. 1976); Goode v. Rizzo, 560 F. 2d 542, 550 (3d Cir. 1974), rev'd on other grounds, Rizzo v. Goode, 523 U.S. 362, 96 S. Ct. 598, 46 L. Ed. 2d 561 (1976).

The uncontroverted material facts in this case are that from December 23, 1981 until January 8, 1982 Plaintiff was a pretrial detainee at the Clinton County Jail (CCJ). On January 8, 1982 Plaintiff was transferred to the State Correctional Institution at Huntingdon (SCIH) without being given a hearing wherein he might voice his opposition to said transfer. On his arrival at SCIH Plaintiff was assigned to Administrative Custody (AC) until such time as he could be taken in front of the Program Review Committee (PRC). This was accomplished

on January 11, 1982. The PRC's determination at that time was that, pending a chance to gather more information about the Plaintiff, he should remain in AC. Plaintiff did, in fact, remain in that mode of custody until February 9, 1982. During the time he was in AC Plaintiff Yurky had all the access to his attorneys permitted by Bureau of Corrections (BOC) regulations. Over three months elapsed from the time Plaintiff was released from General Population (GP) to the time (May 19, 1982) that his trial began. During all relevant times Defendant Eichenlaub was the Warden of CCJ, Defendant Wicker was Deputy Superintendent at SCIH and Defendant Zimmerman was Warden of SCIH.

Plaintiff Yurky's claim is four-pronged: that his transfer from CCJ to SCIH was violative of procedural due pro-

cess; that his assignment to Administrative Custody (AC) at SCIH was violative of procedural and substantive due process; and that his mode of incarceration at SCIH was tantamount to a denial of the 6th Amendment guarantee of effective assistance of counsel. We address these allegations against the various Defendants[1] herein seriatim.

A. Did Defendants Violate Procedural Due Process In Transferring Plaintiff To SCIH?

It is, of course, elementary that procedural due process in a criminal matter requires that the accused have notice of the nature of the charge

---

[1]Defendant Eichenlaub and the "Commonwealth Defendants", Wicker and Zimmerman, have retained separate counsel. Their respective theories of defense, however, are not so dissimilar as to require separate analyses in this opinion.

against him and an opportunity to be heard thereon. Plaintiff Yurky relies on Cobb v. Aytch, 643 F. 2d 946 (1981), for the proposition that pretrial detainees retain several liberty interests relevant to place and conditions of confinement which are not available to sentenced inmates. Specifically, Plaintiff alleges that the act of Defendant Eichenlaub which precipitated his non-consenual transfer to SCIH and his acceptance there by the Commonwealth Defendants violated procedural due process requirements. Cobb, supra, does make it clear that the transfer of a detainee to a more restrictive setting

> . . . may not ordinarily be made until the untried Defendant has received notice of the proposed transfer and an opportunity to be heard in a Pennsylvania tribunal independent of the prison system in opposition to it. The injunction should, however, recognize that

> emergency situations may arise involving the security of the institution in which transfers prior to hearing must be permitted. For those cases a prompt post-transfer hearing in a Pennsylvania tribunal independent of the prison system is an appropriate accommodation between the federal liberty interest of the Defendant and the emergency security concerns of the county prisons.

Id. at 961.

The crux of Plaintiff's claim that he was not afforded procedural due process in connection with his transfer to SCIH is his contention that he was not given adequate notice as to the reason why he was transferred at the Program Review committee Hearing he was given on January 11, 1982. Plaintiff contends that a mere notification by that panel that he was a "security risk" did not comprise the type of notice contemplated by the Cobb Court. Plaintiff complains that he should have been apprised of the

underlying reasons (alleged passport to Lebanon, alleged PLO ties, alleged expertise in martial arts, alleged pendency of serious federal charges, alleged lack of security at CCJ etc.) for his characterization as a security risk.

Our interpretation of this aspect of Cobb, however, is that, in a hearing of this type, notice to a pretrial detainee need not be nearly so detailed as the notice which must necessarily be given a Defendant as to the nature of charges against him to enable him to prepare a criminal defense. Plaintiff Yurky was already validly incarcerated. A prima facie case had been found to exist against him and a factors approach had dictated that high bail, which Yurky failed to raise, be set. Reading further in the same

paragraph from Cobb on which Plaintiff would rely, we encounter an additional concept:

> We do not hold that the opportunity to be heard requires an evidentiary hearing, for in our view the pretrial detainee can be adequately heard by the pleadings. As to the content of the notice, it need only state in general terms the reason for the proposed transfer, so that the independent tribunal may weigh that reason against the degree of interference with the federally protected rights on which the detainee relies. (emphasis ours).

Id. at 961.

We find that the panel's act of informing Mr. Yurky that he was considered a security risk was just the sort of general notice mandated by the Cobb Court. The Program Review Committee was under no compulsion to catalogue for Plaintiff Yurky the facts which led to his characterization as a security risk.

Even apart from finding, as this

Court has, that notice to Plaintiff Yurky was adequate, there is nothing to indicate that the named Defendants herein deprived Yurky of any federally protected right. The record in this case amply demonstrates that Defendant Eichenlaub had a rational basis for requesting the emergency transfer of a prisoner, who, according to the information then available to Eichenlaub, provided a definite security risk in the antiquated setting of CCJ. Furthermore, Eichenlaub followed well-defined Bureau of Corrections procedure in obtaining the approval of Clinton County President Judge Carson V. Brown and Erskind Deramus, the Deputy Commissioner of the Pennsylvania Bureau of Correction, relative to Yurky's transfer to SCIH.

As to Defendants Wicker and

Zimmerman, they are vested with no authority to deny entry to any inmate whose transfer was approved by the Deputy Commissioner or his designee. Hence, they lack the degree of personal involvement in the determination of Plaintiff's place of incarceration to implicate them under 42 U.S.C. §1983.

Put succinctly then, Plaintiff's first claim is not supported by the decisional law which he, himself, relies on. Moreover, were it so, the Defendants named herein have, by acting in strict compliance with the administrative guidelines which govern their respective offices, placed themselves beyond the realm of liability under 42 U.S.C. §1983.

B. Was Plaintiff's Assignment to AC at SCIH Violative of Procedural Due Process?

Plaintiff Yurky correctly points

out that, in light of the Pennsylvania statutes and regulations setting forth the procedures for confining an inmate to administrative segregation, he did acquire a liberty interest in remaining in the general prison population. Hewitt v. Helms, _____U.S._____, 103 S. Ct. 864 (1983). From this, Yurky urges that the deprivation of any liberty interest via state action must satisfy the criteria of due process as promulgated by the 14th Amendment. While this is doubtless true, the salient question to be considered here is: What constituts appropriate due process in this situation? In speaking of the procedures required to satisfy due process under the 14th Amendment, the Supreme Court has declared in Wolff v. McDonnell, 418 U.S. 539, 560 (1974):

> The requirements requirements imposed by the Clause are, of course, flexible and variable dependent upon the particular situation being examined. (Citations). In determining what is 'due process' in the prison context, we are reminded that 'one cannot automatically apply procedural rules designed for free citizens in an open society . . . to the very different situation presented by a disciplinary proceeding in a state prison'.

It is significant that the above quotation from Wolff, supra, is cited by the Court in Hewitt, supra, the very case relied on by Plaintiff in this instance. Reading further in Hewitt we discovery that Justice Rehnquist's majority opinion holds that:

> An inmate must merely receive some notice of the charges against him and an opportunity to present his views to the prison official charged with deciding whether to transfer him to administrative segregation. Ordinarily a written statement by the inmate will accomplish this purpose, although prison administrators may find it more useful to permit oral presentations in cases where they believe a written statement would be

> ineffective. So long as this occurs, and the decisionmaker reviews the charges and then-available evidence against the prisoner, the Due Process Clause is satisfied. Hewitt v. Helms, supra, 103 S. Ct. 864 at 868 (1983).

It becomes clear that Plaintiff Yurky's reliance on Hewitt has engendered a situation in which he is "hoist on his own petard". Since the facts in this case reveal that Yurky received "some notice" of the charges against him and that the decisionmaking committee reviewed these charges and the "then-available evidence against the prisoner", Plaintiff's claim that his assignment to AC at SCIH was accomplished in derogation of procedural due process is without merit.

C. Did Plaintiff's Assignment to Administrative Custody Violate Substantive Due Process?

Plaintiff claims here that his

incarceration in AC did not comport with the substantive aspects of due process protection in that it amounted to an arbitrary government action which deprived him of a protected aspect of his liberty. Plaintiff then proceeds to state that under Pennsylvania Bureau of Corrections (BOC) regulations an inmate may be assigned to administrative custody only when he has: (A) committed a Class I misconduct, 37 Pa. Code 95.104 (b) (1); (B) been placed in investigative status "where it has been determined there is a threat of serious disturbance, or a serious threat to the individual or others", 37 Pa. Code 95.104 (b) (3); or (C) requested such confinement, 37 Pa. Code 95.104 (b) (4).

Unhappily for Plaintiff Yurky, he is mistaken in both these allegations.

Prisoners may also be assigned to AC pursuant to BOC regulations pending a determination of institutional classification. See 37 Pa. Code 95.106. The record discloses that on the day Yurky was given the PRC Hearing which resulted in his assignment to AC he was very much an unknown commodity to the reviewing committee. Nothing was known as to any psychological defects Yurky may have had which would have rendered him unfit for inclusion in the general prison population. Nothing was known as to whether he had enemies at SCIH. What was known was that federal authorities were supposed to take him for arraignment on serious charges and that very high bail had been set in his case. Under these circumstances we can hardly conclude that the PRC's determination to assign Yurky to AC was

so arbitrary as to violate his right to substantive due process.

D. Did Plaintiff's Transfer to SCIH Effectively Deny Him the Effective Assistance of Counsel?

Plaintiff's final claim is that he was denied the effective assistance of counsel which is mandated in a criminal case by the 6th Amendment. Here, again, the record compels us to disallow his claim. While the Supreme Court has never delineated how extensive a pretrial detainee's access to his attorney must be, we find that it was adequate in the instant case. Yurky seems to imply that he was being held virtually incommunicado. However, it is documented that during his brief (30 days) time in AC Yurky was permitted to make phone calls on January 10 and 25, 1982. In the same span Yurky received legal mail on five

occasions. There is no evidence that Yurky ever missed a pretrial hearing or was forced to seek a continuance -- factors which provoked the Court in Cobb v. Aytch, supra, to enjoin the transfer of county detainees into the State penal system -- due to his distance from the counsel he retained. Moreover, both of Plaintiff's lawyers worked within an hour's drive of his place of confinement and had liberal visitation privileges. In view of these facts, this Court finds that Plaintiff's access to counsel was more than adequate to meet 6th Amendment criteria.

Accordingly, the following Judgment will be entered.

Richard P. Conaboy
United States District
Judge

DATE: September 7, 1984

give consent for the transfer.

9) Upon my arrival at Huntingdon on January 8, 1982, I was placed in Administrative Custody in the Restricted Housing Unit.

10) On January 8, 1982 I was provided a document which stated "Security Risk -- See Attached." There was nothing attached to the document I received.

11) On January 11, 1982, I was interviewed by the Program Review Committee.

12) At my interview on January 11, 1982, I was never apprised by the Program Review Committee as to the reasons for my transfer. I never learned of any underlying reasons such as alleged P.L.O. ties, alleged martial arts, alleged passport to Lebanon, until the discovery process in this civil action.

13) At the interview on January 11, 1982, the P.R.C. informed me that Federal authorities would take me for arraignment on new charges and that I would be confined in Administrative Custody Maximum of the Restricted Housing Unit.

14) Prior to, during, and after my interview by the P.R.C. on January 11, 1982, I was never advised as to any justification underlying my label of "security risk."

15) I did not commit any Class I misconduct nor did I request confinement in Administrative Custody.

I declare under penalty of perjury that the foregoing facts are true and

correct, based upon my own personal knowledge.

/s/ David Alan Yurky
David Alan Yurky, Plaintiff

28 March, 1984

/s/ Richard I. Norris
Richard I. Norris, Notary Public
Smithfield Twp., Huntingdon County
My Commission Expires June 4, 1984
Member, Pennsylvania Association of Notaries

(Title Omitted in Printing)

SECOND AFFIDAVIT OF DAVID YURKY

I, David Yurky, do hereby state under penalty of perjury that the following is true and correct based upon my personal knowledge:

1. I am the Plaintiff in this case and was a pretrial detainee at all times relevant to this civil action.

2. In addition to the interference with my defense preparation cited in my Affidavit of David Yurky attached to Plaintiff's Brief in Opposition to Cross-motion of Zimmerman & Wicker for Summary Judgment, I would also assert that as a result of this interference I was unable to contact a material witness for my preliminary hearing in Centre County.

3. I also was unable to contact character witnesses for my bail reduction hearing; which as a result, my bail was not significantly reduced.

4. The Pennsylvania Bureau of Corrections provides ten free letters a month to each prisoner. Once those ten letters (or comparable postage) is mailed, the prisoner must purchase any subsequent envelopes from the commissary if he has the funds.

5. Following my arraignment before the Court January 26, 1982 in Clinton County, my attorney had seven days to file a Motion for a Bill of Particulars. The public defender at the preliminary hearing was was thus unfamiliar with the case. In this particular instance, I was denied a request to call my attorney and had used my ten Commonwealth letters and

was therefore unable to communicate in any form with counsel. The Bill of Particulars Motion subsequently suffered because of lack of specificity and the indictment and District Attorney's presentation was not adequately clarified until trial.

/s/ David Yurky
David Yurky

(Title Omitted in Printing)

DECLARATION OF CHARLES H. ZIMMERMAN

I, CHARLES H. ZIMMERMAN, do hereby state under penalty of perjury that the following is true and correct based upon my personal knowledge:

1. I am currently employed by the Pennsylvania Bureau of Correction (BOC) as Superintendent of the State Correctional Institution at Graterford, Pennsylvania (SCI-G) and have been so employed since August, 1983.

2. Immediately prior to my current employment, I was employed by the BOC as Superintendent of the State Correctional Institution at Huntingdon, Pennsylvania (SCI-H) and occupied that position since June, 1980.

3. As Superintendent at SCI-H, I did not have any authority to approve the transfer of any inmate from a county facility to SCI-H. All such transfers were made by the BOC's Deputy Commissioner of Correction (hereinafter "Deputy Commissioner") or his designee.

4. I have never been the Deputy Commissioner's designee for purposes of transferring prisoners from county to state facilities, or vice versa, nor for the transfer of inmates from one state institution to another.

5. As Superintendent at SCI-H, I had no authority or discretion to refuse receipt of any inmate whose transfer to SCI-H was approved by the Deputy Commissioner or his designee, nor did I have any authority to direct any of my

subordinates to refuse receipt of any such person.

6. As Superintendent at SCI-H, I oversaw the administration and operation of that correctional institution and was personally familiar with standard administrative practices within the institution.

7. For all times relevant to this matter, it was standard procedure at SCI-H that the Program Review Committee (PRC) did not meet on weekends.

8. At no time prior to service of the complaint in this matter did I ever have or receive any communication from Mr. Yurky regarding his placement in AC from January 8, 1982 to February 9, 1982.

9. I harbour no ill will toward the plaintiff and, at all times, I have acted

in the good faith belief that my actions were lawful.

_____

Charles H. Zimmerman

Executed on: _____

(Title Omitted in Printing)

DECLARATION OF CHARLES H. ZIMMERMAN

I, CHARLES H. ZIMMERMAN, do hereby state under penalty of perjury that the following is true and correct based upon my personal knowledge:

1. I am presently the Superintendent of the State Correctional Institution at Graterford (SCI-G).

2. For all times relevant to the above-captioned action, I was Superintendent for the State Correctional Institution at Huntingdon (SCI-H).

3. I previously executed an unsworn declaration relative to this matter on April 13, 1984.

4. As Superintendent of SCI-H, I was personally familiar with the institu-

tion's policy relating to the posting of inmates' legal mail.

5. For all times relevant to this action, the following was the legal mailing policy in effect at SCI-H: when an inmate wished to send legal mail but had exhausted his monthly allotment of free postage and had no funds in his personal account to pay for such postage, his legal mail was posted and the charge therefor was entered against his inmate account to be assessed at a later date when funds were placed in his account. No limit was placed on the amount of postage which could be charged against an inmate's account in such circumstances.

6. Pursuant to the previously-described procedure, an inmate could send whatever legal mail he chose even though

he had already exhausted his free postage allotment and had no personal funds to pay for the same.

/s/ Charles H. Zimmerman
Charles H. Zimmerman

Executed on: _____

Sworn and subscribed before me this 29th day of May, 1984.

/s/ Michael J. Cappo
Michael J. Cappo, Notary Public
Graterford, Montgomery County, PA
My Commission Expires April 15, 1985

(Title Omitted in Printing)

DEFENDANT HARRY W. EICHENLAUB'S
RESPONSE TO DECLARATION OF
DEFENDANT CHARLES H. ZIMMERMAN

Defendant Harry W. Eichenlaub, by his attorneys Candor, Youngman, Gibson & Gault, respectfully submits the following response to Declaration of Defendant Charles H. Zimmerman:

1. Paragraphs 1 through 3, and 7 through 9, inclusive, are admitted.

2. Paragraphs 4, 5 and 6 are denied for the reason that after reasonable investigation, Defendant Harry W. Eichenlaub is without sufficient knowledge or information to form a belief as to the truth of the averment and the said is, therefore, denied.

CANDOR, YOUNGMAN, GIBSON & GAULT

By /s/ John C. Youngman, Jr.
John C. Youngman, Jr.
I.D. No. 07582
Attorneys for Defendant
Harry W. Eichenlaub

(Title Omitted in Printing)

DECLARATION OF EMANUEL C. WICKER

I, EMANUEL C. WICKER, do hereby state under penalty of perjury that the following is true and correct based upon my personal knowledge:

1. I am employed by the Pennsylvania Bureau of Correction (BOC) as Deputy Superintendent for Operations at the State Correctional Institution at Huntingdon, Pennsylvania (SCI-H) and have been so employed for all times relevant to this action.

2. As Deputy Superintendent for Operations at SCI-H, I do not now nor have I ever had any authority to approve the transfer of any inmate from a county correctional facility to a state institution.

3. At no time have I ever been the designee of the Deputy Commissioner of Correction with respect to the approval of inmate transfers from county facilities to SCI-H, or vice versa, nor have I ever been designated to authorize the transfer of inmates from one state institution to another.

4. As Deputy Superintendent of Operations, I routinely maintain copies of any requests directed to me by inmates.

5. I have no record of ever having received any request from David Alan Yurky seeking permission to place additional phone calls during his confinement in Administrative Custody from January 8, 1982 to February 9, 1982, nor any request to be released from such custody because federal authorities were not in fact

going to arrive at SCI-H to take him for arraignment on federal charges.

6. I harbour no ill will toward the plaintiff and, at all times, I have acted in the good faith belief that my actions were lawful.

/s/ Emanuel C. Wicker
Emanuel C. Wicker

Executed on: 4-13-84

(Title Omitted in Printing)

DEFENDANT HARRY W. EICHENLAUB'S RESPONSE TO DECLARATION OF DEFENDANT EMANUEL C. WICKER

Defendant Harry W. Eichenlaub, by his attorneys Candor, Youngman, Gibson & Gault, respectfully submits the following response to Declaration of Defendant Emanuel C. Wicker:

1. Paragraphs 1, 4, 5 and 6 are admitted.

2. Paragraphs 2 and 3 are denied for the reason that after reasonable investigation, Defendant Harry W. Eichenlaub is without sufficient knowledge or information to form a belief as to the truth of the averment and the said is, therefore, denied.

CANDOR, YOUNGMAN, GIBSON & GAULT

By /s/ John C. Youngman, Jr.
John C. Youngman, Jr.
I.D. No. 07582
Attorneys for Defendant
Harry W. Eichenlaub

(Title Omitted in Printing)

RESPONSE TO DEFENDANTS ZIMMERMAN AND WICKER TO PLAINTIFF'S STATEMENT OF UNDISPUTED FACTS MATERIAL

In accordance with the provisions of M.D. Pa. 401.4, defendants Zimmerman and Wicker, by their attorneys, submit the following response to plaintiff's Statement of Undisputed Facts:

1. Defendants are without sufficient knowledge or information so as to be able to admit or deny the statements contained in this paragraph.

2. Admitted that on January 8, 1982, plaintiff was incarcerated in the Clinton County Jail as a pretrial detainee awaiting disposition of criminal charges. Defendants are without sufficient knowledge or information so as to be able

to admit or deny the remainder of the statements in this paragraph.

3. Defendants are without knowledge or information sufficient to admit or deny the statements contained in this paragraph.

4. Defendants are without knowledge or information sufficient to admit or deny the statements contained in this paragraph.

5. Admitted.

6. Defendants are without knowledge or information sufficient to admit or deny the statements contained in this paragraph.

7. Defendants are without knowledge or information sufficient to admit or deny the statements contained in this paragraph.

8. Admitted that at no time after transfer to the State Correctional Institution at Huntingdon (SCI-H), plaintiff never gave consent for his transfer to that institution. Defendants are without sufficient knowledge or information to be able to admit or deny the remainder of the statements in this paragraph.

9. Admitted.

10. Admitted.

11. Admitted.

12. Denied that plaintiff was never told the reason for his transfer. In fact, plaintiff was told that he was transferred as a security risk, to SCI-H, by the Program Review Committee. Admitted that plaintiff was never told the underlying reasons for his transfer by the Program Review Committee.

13. Admitted that at his January 11, 1982 interview with the Program Review Committee, plaintiff was told that federal authorities would be taking him for arraignment on bank robbery charges, and that he would remain in the Administrative Custody (Maximum) area of the Restricted Housing Unit. Denied that was the sole information told to plaintiff. Plaintiff, in fact, was told that he had been transferred to SCI-H as a security risk.

14. Admitted that during plaintiff's interview with the Program Review Committee on January 11, 1982, plaintiff was never advised as to the underlying reasons for the county's description of him as a security risk. Defendants are without sufficient information to be able

to admit or deny the remaining statements in this paragraph.

15. Admitted that the Bureau of Correction JBC-7X and JCB-185 forms were the documents which served as the basis for describing plaintiff as a "security risk" on the BC-141D form given him on January 8, 1982.

16. Admitted that for all times relevant to this action, plaintiff never committed a Class I misconduct while at SCI-H, nor did he ever request confinement in Administrative Custody.

Respectfully submitted,

LEROY S. ZIMMERMAN
Attorney General

By /s/ Amy Zapp
Amy Zapp
Deputy Attorney General

ALLEN C. WARSHAW
Deputy Attorney General
Chief, Litigation Section

Date: April 16, 1984

(Title Omitted in Printing)

RESPONSE TO STATEMENT OF
UNDISPUTED FACTS OF PLAINTIFF YURKY

1. Admitted.

2. Admitted.

3. Admitted.

4. Admitted.

5. Admitted.

6. Admitted.

7. Admitted.

8. Admitted.

9. Admitted.

10. Admitted.

11. Admitted.

12. Denied. After reasonable investigation, Defendant Harry W. Eichenlaub is without knowledge or information sufficient to form a belief as to

the truth of the averment and the said is, therefore, denied.

13. Denied. After reasonable investigation, Defendant Harry W. Eichenlaub is without knowledge or information sufficient to form a belief as to the truth of the averment and the said is, therefore, denied.

14. Denied. After reasonable investigation, Defendant Harry W. Eichenlaub is without knowledge or information sufficient to form a belief as to the truth of the averment and the said is, therefore, denied.

15. Denied. After reasonable investigation, Defendant Harry W. Eichenlaub is without knowledge or information sufficient to form a belief as to

the truth of the averment and the said is, therefore, denied.

16. Admitted.

CANDOR, YOUNGMAN, GIBSON & GAULT

By /s/ John C. Youngman, Jr.
John C. Youngman, Jr.
I.D. No. 07582
Attorneys for Defendant
Harry W. Eichenlaub

(Title Omitted in Printing)

DECLARATION OF CURTIS C. CARSON

I, CURTIS C. CARSON, do hereby state under penalty of perjury that the following is true and correct based upon my personal knowledge:

1. I am employed by the Pennsylvania Bureau of Correction (BOC) as Corrections Records Supervisor at the State Correctional Institution at Huntingdon, Pennsylvania (SCI-H).

2. In that capacity, I am the custodian of the JBC-15 records jackets routinely maintained for each of the inmates incarcerated at SCI-H and am responsible for supervising the collection and compilation of documents routinely placed in the inmates' records jackets.

3. Each time an inmate is transferred from a county facility to SCI-H, the following forms are prepared relating to that transfer and are subsequently placed in the inmate's institutional file: JBC-7X (Temporary Transfer Information); JBC-185 (Transmittal Data for County Prison Transfer), and JBC-5B (Petition for Transfer: County Prisons).

4. Each time an inmate is placed in Administrative Custody (AC), a BC-141D form is prepared and a copy placed in the inmate's JBC-15 records jacket.

5. A document routinely filed in the JBC-15 records jacket is the Cumulative Adjustment Record (BC-14) on which, inter alia, any action by SCI-H's Program Review Committee (PRC) involving the inmate is routinely recorded.

6. Another document routinely filed

in the JBC-15 records jacket is an Adjustment Record (AR) on which information pertinent to an inmate's confinement in the institution's Restricted Housing Unit (RHU), including any telephone calls permitted and legal mail received is routinely recorded. Receipt of legal mail is ordinarily recorded on the AR by placing an "L" in the "Mail" block found in the upper portion of the form for the appropriate day.

7. Entries on the JBC-7X, JBC-185, JBC-5B, JBC-14, and AR are made at or near the time of the occurrence of the event recorded.

8. Each of the foregoing entries is made by a person having personal knowledge of the information recorded or by a person to whom the information recorded has been transmitted by a person

having personal knowledge of the same.

9. A true and correct copy of the JBC-7X prepared in connection with David Alan Yurky's transfer from the Clinton County Jail (CCJ) to SCI-H on January 8, 1982, is attached hereto as Exhibit I.

10. A true and correct copy of the JBC-185 prepared in connection with such transfer is attached hereto as Exhibit II.

11. A true and correct copy of the JBC-5B prepared in connection with such transfer is attached hereto as Exhibit III.

12. A true and correct copy of Yurky's BC-14 for the months of January and February, 1982, is attached hereto as Exhibit IV.

13. A true and correct copy of

Yurky's AR for the same time period is attached hereto as Exhibit V.

14. A true and correct copy of a BC-141D dated January 8, 1982 (relating to Yurky's placement in AC on that day) is attached hereto as Exhibit VI.

15. The attached documents indicate as follows:

a. Yurky was transferred to SCI-H from CCJ on January 8, 1982, as a security risk and the recommended confinement at SCI-H was "maximum security."

b. At the time of his transfer on that date, Yurky was a pre-trial detainee.

c. Upon arrival at SCI-H, Yurky was placed AC (Maximum) pending his being seen by the PRC.

d. Yurky was seen by the PRC on January 11, 1982.

e. Yurky's confinement in AC (Maximum) was continued by the PRC on that date.

f. Yurky was interviewed by the PRC on February 9, 1982, and was released from Administrative Custody to the general population.

g. During the time Yurky was in AC from January 8, 1982 until February 9, 1982, he was permitted phone calls on two occasions, specifically on January 10 and January 25, 1982.

h. During the same time period, Yurky received legal mail on five different dates: January 16, 23, 29, 30, and February 6, 1982.

/s/ Curtis C. Carson
Curtis C. Carson

Executed on: 4/13/84

BEST AVAILABLE COPY

FORM IS TO BE FORWARDED TO AUTHORITIES ACCEPTING TEMPORARY CUSTODY OF RESIDENTS)

-121-

SCIH

FROM: CLINTON COUNTY JAIL
(SEE INSTRUCTIONS BELOW)

Name: YURKY, DAVID ALLEN AGE: 30

Home Address: P.O. BOX 415 STATE COLLEGE PA.

Charge: CRIMINAL CONSPIRACY, CRIMINAL COMPLICITY

Sentence: WAITING TRIAL Bill & Term No.

Minimum Date: Maximum Date:

Detainer (s): F.B.I WILL BE TAKING MR YURKY ON 1/11/82 TO BE ARRAIGNED ON CHARGES OF BANK ROBBERY

The above named person is being transferred on 1/8/82 for the purpose of SECURITY RISK --

To assist in supervising this resident while in your custody, the following information is furnished:

Custodial Classification: MAXIMUM SECURITY

Special Problems: NONE KNOWN

Medical Information: NONE

Recommendations:

DATE: 1/8/82

SIGNATURE: Robt G. Miller

TITLE: ASST WARDEN
RECORD OFFICER

INSTRUCTIONS: THIS FORM IS TO BE GIVEN TO THE OFFICERS ASSUMING CUSTODY OF RESIDENT FOR DELIVERY TO THE COGNIZANT AUTHORITY. PREPARE IN DUPLICATE, RETAIN COPY FOR RECORD JACKET.

SIGNATURE: Robt G. Miller

TITLE: ASST/WARDEN

(Title Omitted in Printing)

DECLARATION OF GLEN R. JEFFES

I, GLEN R. JEFFES, do hereby state under penalty of perjury that the following is true and correct based upon my personal knowledge:

1. I am presently employed by the Commonwealth of Pennsylvania as Acting Commissioner of Correction and have been so employed since July, 1983.

2. In that capacity, I am responsible for the operation and administration of the Pennsylvania Bureau of Correction (BOC).

3. Prior to assuming the duties of Acting Commissioner, I was employed by the BOC for approximately 11 years in various capacities including Deputy Superintendent at the State Correctional

Institution at Rockview, Superintendent at the State Correctional Institution at Dallas, and as Acting Superintendent of the State Correctional Institution at Graterford.

4. Both in my present capacity and in my prior positions with the BOC, I am, and was, personally familiar with administrative directives routinely issued by the BOC setting forth standard operational procedures to be observed in a variety of situations.

5. Procedures in force during January, 1982 pertaining to the transfer of inmates held in county correctional facilities to state correctional institutions were set forth in Administrative Directive OM-102 (dated August 10, 1981).

6. A true and correct copy of OM-102 is appended hereto as Exhibit I.

7. Pursuant to the procedures set forth in OM-102, it was the responsibility of the transferring county officials to ensure that any hearing which may have been required in connection with the transfer of an inmate from a county facility to a state institution was held.

8. The same obligation endured in situations where the inmate was transferred on an emergency basis to a state institution, a contingency which is referenced in Part III, Paragraph F of OM-102.

9. The statement contained in such paragraph that "[t]he required hearing procedures before the Program Review Committee [PRC], including 24 hour written notice in advance of the hearing shall be accomplished by the receiving institution in a timely manner," did not

relieve the county officials from providing a transfer-related hearing, if such was mandated by the particular circumstances of the transfer. Rather, the foregoing statement referred to the hearing to be conducted by the receiving institution which is described in Part IV, Paragraph B(3) of OM-102 for the purpose of evaluating the inmate transferred and assigning institutional quarters.

10. Additionally, pursuant to the procedures contained in OM-102, specifically in Part IV, Paragraph B(3) thereof, inmates transferred to state institutions from county facilities were routinely placed in Administrative Custody upon reception at the state institution until such time as they could be seen by the

PRC for appropriate evaluation and quarters assignment.

/s/ Glen R. Jeffes
Glen R. Jeffes

Executed on: April 13, 1984

/s/ Rosalie Alberta Schell
Rosalie Alberta Schell
Notary Public
My Commission Expires April 11, 1985
Harrisburg, Pa. Dauphin County

(Title Omitted in Printing)

DECLARATION OF BENNY E. VARNER

I, BENNY E. VARNER, do hereby state under penalty of perjury that the following is true and correct based upon my personal knowledge:

1. I am currently employed by the Pennsylvania Bureau of Correction (BOC) as a Corrections Officer III (Lieutenant) at the State Correctional Institution at Huntingdon, Pennsylvania (SCI-H) and was so employed on January 8, 1982, and for all intervening times.

2. On January 8, 1982, in accordance with the then applicable standard institutional procedures, I prepared a BC-141D form relating to the placement of David Alan Yurky, an inmate received at SCI-H on that date as an HVA (Hold for Various

Authorities), in Administrative Custody (AC). A true and correct copy of that BC-141D is appended hereto as Exhibit I.

3. I prepared such form at approximately 9:00 p.m., which was close to the time Yurky entered SCI-H.

4. To the best of my recollection, I appended the JBC-7X (Temporary Transfer Information) and JBC-185 (Transmittal of Data for County Prison Transfer) forms which accompanied the inmate to the BC-141D.

5. In accordance with the then prevailing standard procedure, copies of the attachments to the BC-141D were not appended to the copy of the BC-141D given the inmate.

/s/ Benny E. Varner
Benny E. Varner

Executed on: 4-13-84

ARTERS	Assignment: -115a-	Place of Misconduct	

OTHER INMATES OR STAFF INVOLVED OR WITNESSES (CHECK I OR W)

BC Number	Name	I	W	BC Number	Name	I	W

CONDUCT

FF MEMBER'S VERSION SECURITY RISK
SEE ATTACHED

EDIATE ACTION TAKEN AND REASON CONFINED TO ADMINISTRATIVE
VSTODY UNIT SEEN BY PROGRAM REVIEW
COMMITTEE.

STAFF MEMBER REPORTING MISCONDUCT SIGNATURE AND TITLE	ACTION APPROVED BY RANKING C.O. ON DUTY SIGNATURE AND TITLE	DATE AND TIME INMATE GIVEN COPY	
		DATE	TIME 24 HOUR BASE
D. Varner COII	Capt R.A. Clement	1-8-82	2:00 hrs

ring Date	Hearing Time	Location of Hearing	Misconduct Category	Signature of Person Serving Notice
			☐ Class I ☐ Class 2	COI

NOTICE TO INMATE

are scheduled for a hearing on this allegation on the date and the time indicated or as soon thereafter as possible. You may remain silent, u wish, and anything you say will be used against you both at the hearing and in a court of law if this matter is referred for criminal ecution. If you choose to remain silent, the hearing committee may hold your silence against you, but they must have some other evidence se your silence in order to find you guilty. If you indicate that you wish to remain silent, you will be asked no further questions.

may be represented by another inmate of general population status or a member of the institutional staff at your hearing.

may request witnesses who will be permitted to testify at the hearing provided they are willing, relevant and do not create a security rd; relevancy and security will be determined by the chairman of the hearing committee.

u wish to take advantage of either or both of these choices, please notify the chairman of the hearing committee in writing immediately on orm provided.

☐ If this block is checked and you are found guilty of the above described misconduct, the hearing committee may suspend or revoke your pre-release status.

T - BC 18 - YELLOW - DEPUTY SUPERINTENDENT'S COPY - STAFF MEM

BEST AVAILABLE COPY

(Title Omitted in Printing)

DECLARATION OF TERRY W. HENRY

I, TERRY W. HENRY, do hereby state under penalty of perjury that the following is true and correct based upon my personal knowledge:

1. I am employed by the Pennsylvania Bureau of Correction (BOC) as Director of Treatment at the State Correctional Institution at Huntingdon, Pennsylvania (SCI-H) and was so employed on January 11, 1982, and for all intervening times.

2. On January 11, 1982, I served as a member of the Program Review Committee (PRC) at SCI-H.

3. Each time the PRC takes an action involving a prisoner, a brief description of the action is recorded on the inmate's BC-14 (Cumulative Adjustment Record).

4. A true and correct copy of that portion of David Alan Yurky's BC-14 encompassing January 11, 1982 is attached hereto as Exhibit I.

5. That document reveals that: (a) on January 11, 1982, Yurky was being held at SCI-H as an HVA (Hold for Various Authorities); (2) he was personally interviewed by the PRC on that date; (3) Yurky was advised at his PRC hearing that the PRC had information that federal authorities would be arriving the same day to take him for arraignment on bank robbery charges; and, (4) he was also told that his housing status at SCI-H would continue as Administrative Custody (Maximum).

6. To the best of my recollection, the only information the PRC had on that date regarding Yurky was that contained

on the JBC-7X and JBC-185 forms prepared in connection with his transfer to SCI-H.

7. The PRC's actions that date were, to the best of my recollection, based solely on those documents.

8. To the best of my recollection, during his interview with the PRC on January 11, 1982, Yurky was advised that he had been transferred to SCI-H as security risk, but since no other information was contained on the JBC-7X and JBC-185 forms, none of the underlying reasons for such classification were discussed with him.

9. Based on the available information, the PRC believed that Yurky's placement in AC (Maximum) was indicated until such time as his conduct could further be evaluated and a determination

made as to the degree of supervision and structure necessary.

/s/ Terry W. Henry
Terry W. Henry

Executed on: 4/13/84

CUMULATIVE
ADJUSTMENT RECORD

COMMONWEALTH OF PENNSYLVANIA
BUREAU OF CORRECTION

SCIH
Institution

Institutional Number	PBP Number	Name
50471		Yurky

DATE	OBSERVATION	
1-11-82	PRC Received from Clinton County Held for Clinton Co. Fed Authorities will be here to take him ATA today. No Pay (Assign AC Max) Review 2-10-82	/s/ JAD /s/ TWH /s/ ECS
1-14-82	Yurky is still here - AC Max. Assigned to Mr. Thomas.	/s/ BKS
1-20-82	Reviewed file. Contacted Blk officers. They report that Yurky is doing well.	/s/ JT
1-25-82	COUNSELOR'S WEEKLY RHU INTERVIEW Is anxious to move to AC close. Counselor recommend this A.S.A.P. Appears to be making an acceptable adjustment. He claims he is trying to make bail.	/s/ JT
2-1-82	COUNSELOR'S WEEKLY RHU INTERVIEW No reason to keep him in A.C. Max. Recommend transfer to A.C. close.	/s/ JT
2-4-82	PROGRAM REVIEW COMMITTEE CASE REVIEW	/s/ awg

August 10, 1981

SUBJECT: County Prison Transfers

TO: Superintendents
Wardens and Sheriff-Wardens of
County Prisons and Jails

Dear Correctional Administrators:

I. PURPOSE

This Administrative Memorandum establishes the official policies and procedures to be used in handling HVA cases, consistent with current law and procedures prescribed by the Third Circuit Court of Appeals.

II. SCOPE

The procedures described in this memorandum apply to all county prisons and jails and to all correctional facilities operated by the Bureau of Correction.

III. PROCEDURES FOR TRANSFER

County prisons and jails may request the transfer of prisoners to the institutions of the Bureau of Correction for reasons of overcrowding, security, medical purposes, or other existing conditions when the prison cannot furnish proper and sufficient accommodations for the care, custody, control, and safety of the inmates. Specific procedures must be followed.

A. Requests for transfer shall be initiated by the county prison and shall be submitted to the Deputy Commissioner of the Bureau of Correction (or designee). Forms required in this process include: JBC-5B,

Petition for Transfer - County Prisons; and the JBC-185, Transmittal of Data for County Prison Transfer. The completed forms and a short narrative indicating the reason for requesting the transfer, including any special considerations such as age or physical condition of the inmate, shall be submitted to the Bureau of Correction. The JBC-5B must be signed by a Judge of the Court of Common Pleas of the county in which the prisoner is confined prior to submission to the Bureau of Correction.

B. The Bureau of Correction shall review the request and return

the JBC-5B to the county prison with approval or disapproval. Medical transfer shall be reviewed by the Chief of Health Care Services of the Bureau of Correction to determine availability of medical services in the state correctional institution.

C. The status of the prisoner shall be determined by the warden and the appropriate procedures implemented.

1. Unconvicted prisoners may give their written consent to be transferred. If such written consent is not obtained, a hearing must be conducted. The prisoner must be given written

notice of the hearing 24 hours in advance including the reason for the proposed transfer. A judge of the Court of Common Pleas of the county in which the prisoner is confined must sign the JBC-5B.

2. Convicted but unsentenced prisoners shall be processed in the same manner as in 1. above.

3. Sentenced prisoners (sentenced to the county facility) must be given notice of the fact that a transfer will occur including a general statement of the reasons for the transfer. A judge of the

Court of Common Pleas of the county in which the prisoner is confined must sign the JBC-5B. It is not necessary to request the consent of the prisoner, nor is it necessary to hold a hearing.

D. The warden shall arrange transportation of the prisoner with the sheriff. Sentenced prisoners approved for transfer and those committed under Rule 1403 of the Pa. Rule of Crim. Proc. shall be delivered to a designated diagnostic-classification center and processed accordingly. Those prisoners who are untried or unsentenced shall be delivered

to a designated state correctional institution.

E. The warden shall complete the JBC-7X, Temporary Transfer Information. This form and documents verifying prisoner consent or the proper hearing procedures must accompany the prisoner to the state facility. A photocopy of the commitment order (for sentenced prisoners) must also be included. Only the JBC-7X is required for sentenced prisoners. The Bureau of Correction shall not accept a county prison transfer without these documents.

F. Emergency transfers may be approved orally by the Deputy Commissioner with all of the

above procedures accomplished after-the-fact. In such cases of dire emergency, the prisoner shall be notified in writing of the transfer including the reason prior to the transfer. The required hearing procedures before the Program Review Committee, including 24 hour written notice in advance of the hearing shall be accomplished by the receiving institution in a timely manner. The inmate may waive the 24 hour advance notice in writing.

G. If deemed necessary, a county prisoner may be transferred to another state correctional institution utilizing regular Bureau of Correction inter-

institutional transfer procedures.

IV. PROCEDURES FOR RECEPTION AT A STATE FACILITY

A. Identification: Upon reception, the usual identification procedures shall be accomplished, including the issuing of an identification number. The number to be issued is to be taken sequentially from the special number series designated for HVA cases. Sentenced prisoners or those committed under 61 P.S. §81 shall be issued a regular BC number and processed in accordance with usual diagnostic center procedures.

B. Housing:

1. HVA cases received as medical transfers shall be placed in the hospital or infirmary.
2. HVA cases received under Rule 1043 of Pa. Rule of Crim. Proc. shall be housed in the diagnostic center.
3. All other HVA cases shall initially be placed in Administrative Custody pending evaluation and hearing by the PRC to determine appropriate housing. The inmate shall be given written notice of the hearing at least 24 hours in advance. The inmate may waive such

notice in writing. The hearing shall be held as soon as practical after reception.

4. If the inmate has been sentenced to a time certain period of confinement in disciplinary custody by the county facility prior to his transfer to state custody, the inmate may serve the balance of the period of disciplinary custody imposed by the county in disciplinary custody in the state institution or facility. The misconduct review procedure set forth in BC-ADM 801

shall be made available to such an inmate.

C. Intake Procedures: Unless the inmate is to remain in state custody only for a very short period of time, regular intake procedures for new receptions shall be followed. Inmates shall not be denied placement in general population for the sole reason that they are HVA's.

D. Medical:

Medical treatment shall be provided to HVA cases in the same manner as for sentenced inmates. Should medical treatment outside of the institution be necessary, the committing county shall be notified and

billed accordingly for additional expenses incurred. When the medical director determines that no further care in a state institution is required, a written statement shall be provided to the Record Office, and the inmate shall be returned to the county facility from which he came.

E. Program Participation and Work: HVA cases may be included in programs consistent with the program level assigned. Unsentenced inmates shall not be required to work, but may be assigned jobs upon written request. Pay shall be consistent with provisions of the Inmate Compensation System.

F. Handling Personal Property:

1. Medical Cases:

a. Upon reception from the county, all personal property shall be inventoried and processed in accordance with Bureau of Correction procedures.

b. The inmate shall be permitted to retain items specifically permitted in our institutions which can be adequately inspected for contraband and in keeping with his medical condition, custody status and housing assignment.

c. The remaining items shall be packed and stored at the institution.

d. As medical HVA's are to be returned to the county upon completion of medical treatment, all personal property shall be returned with the inmate at that time.

2. Other HVA's:

a. Upon reception from the county, all personal property shall be inventoried and processed in accordance with Bureau of Correction procedures.

b. The inmate shall be permitted to retain those items specifically permitted in our institutions consistent with custody status and housing assignment which can be adequately inspected for contraband.

c. The remaining items shall be packed and stored at the institution.

d. A reasonable amount of personal outer clothing should be washed/cleaned and stored by the institution for use by the

inmate for future ATA releases. The institution should determine what is a reasonable amount taking into consideration the condition of the clothing and season of the year.

e. Upon notification that an HVA case is to be released ATA, he shall be required to pack the personal property in his possession in accordance with OM-102, Chapter V, Supplement 1. He may take with him necessary personal hygiene items, prescribed medication

for a 24 hour period, legal materials and personal outer clothing.

f. The inmate shall be advised that his remaining personal property shall be held at the institution until his return or if the disposition of his case results in his not being returned to the Bureau of Corrrection, upon written request will be shipped to him at his expense.

g. Should the disposition of his case result in his sentence to a

diagnostic center in the Bureau of Correction upon completion of classification and after transfer to his assigned institution, it shall be the responsibility of the inmate to notify the institution holding his personal property. It shall then be shipped to him via Bureau transportation.

G. A state prisoner serving a sentence with a total maximum of five (5) years or less may be considered for transfer to a county facility for protective purposes or in special instan-

ces here a specific program such as work release may be available and justified in an individual program effort. Such transfers will be processed through the Deputy Commissioner or his designee utilizing the JBC-5B Petition for Transfer County Prisons), and JBC-185 (Transmittal of Data for County Prison Transfer).

V. This Administrative Memorandum supersedes all previous communique on this subject and shall become effective immediately. It replaces

Chapter VI section 01 of the OM-102 Classification Manual.

Sincerely,

/s/ Ronald J. Marks
Ronald J. Marks
Commissioner

RJM:jb

cc: Deputy Commissioner
Bureau Directors
L. Smith
D. Gearhart
S. Sturgis
L. Hewitt
K. Robinson
J. Smith

FORM BC-141D PART 1

☐ MISCONDUCT REPORT ☒ OTHER

COMMONWEALTH OF PENNSYLVANIA
BUREAU OF CORRECTION

№ 157364

BC Number	Name	Institution	Misconduct Time 24 Hr. Base	Misconduct Date
	YURKY, DAVID	SCIH	2100	1-8-82

QUARTERS	Assignment	Place of Misconduct

OTHER INMATES OR STAFF INVOLVED OR WITNESSES (CHECK I OR W)

BC Number	Name	I	W	BC Number	Name	I	W

MISCONDUCT

STAFF MEMBER'S VERSION SECURITY RISK
SEE ATTACHED

IMMEDIATE ACTION TAKEN AND REASON CONFINED TO ADMINISTRATIVE CUSTODY UNTIL SEEN BY PROGRAM REVIEW COMMITTEE

STAFF MEMBER REPORTING MISCONDUCT SIGNATURE AND TITLE	ACTION APPROVED BY RANKING C.O. ON DUTY SIGNATURE AND TITLE	DATE AND TIME INMATE GIVEN COPY DATE	TIME 24 HOUR BASE
B. Varner COII	Capt. R. [illegible]	1-8-82	2100 hrs

Hearing Date	Hearing Time	Location of Hearing	Misconduct Category	Signature of Person Serving Notice
			☐ Class 1 ☐ Class 2	[illegible] COI

NOTICE TO INMATE

You are scheduled for a hearing on this allegation on the date and the time indicated or as soon thereafter as possible. You may remain silent, if you wish, and anything you say will be used against you both at the hearing and in a court of law if this matter is referred for criminal prosecution. If you choose to remain silent, the hearing committee may hold your silence against you, but they must have some other evidence besides your silence in order to find you guilty. If you indicate that you wish to remain silent, you will be asked no further questions.

You may be represented by another inmate of general population status or a member of the institutional staff at your hearing.

You may request witnesses who will be permitted to testify at the hearing provided they are willing, relevant and do not create a security hazard; relevancy and security will be determined by the chairman of the hearing committee.

If you wish to take advantage of either or both of these choices, please notify the chairman of the hearing committee in writing immediately on the form provided.

☐ If this block is checked and you are found guilty of the above described misconduct, the hearing committee may suspend or revoke your pre-release status.

BEST AVAILABLE COPY

FORM JBC-7X

TEMPORARY TRANSFER INFORMATION

(THIS FORM IS TO BE FORWARDED TO AUTHORITIES ACCEPTING TEMPORARY CUSTODY OF RESIDENTS)

COMMONWEALTH OF PENNSYLVANIA

DEPARTMENT OF JUSTICE
BUREAU OF CORRECTION

TO: SCIH

FROM: CLINTON COUNTY JAIL
(SEE INSTRUCTIONS BELOW)

RE: Name: YURKY, DAVID ALLEN AGE: 30

Home Address: P.O. BOX 415 STATE COLLEGE PA.

Charge: CRIMINAL CONSPIRACY, CRIMINAL COMPLICITY

Sentence: WAITING TRIAL Bill & Term No.

Minimum Date: Maximum Date:

Detainer (s): F.B.I WILL BE TAKING MR YURKY ON 1/11/82 TO BE ARRAIGNED ON CHARGES OF BANK ROBBERY

The above named person is being transferred on 1/8/82 for the purpose of SECURITY RISK

To assist in supervising this resident while in your custody, the following information is furnished:

Custodial Classification: MAXIMUM SECURITY

Special Problems: NONE KNOWN

Medical Information: NONE

Recommendations:

BEST AVAILABLE COPY

DATE:	SIGNATURE:	TITLE: ASST WARDEN
1/8/82	Robt A. Miller	RECORD OFFICER

INSTRUCTIONS: THIS FORM IS TO BE GIVEN TO THE OFFICERS ASSUMING CUSTODY OF RESIDENT FOR DELIVERY TO THE COGNIZANT AUTHORITY. PREPARE IN DUPLICATE, RETAIN COPY FOR RECORD JACKET.

TRANSMITTAL OF DATA FOR COUNTY PRISON TRANSFER

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF JUSTICE
BUREAU OF CORRECTION

INSTRUCTIONS

Complete this form, retaining one copy for your file. Forward it to the Deputy Commissioner for Treatment, Bureau of Correction, Box 200, Camp Hill, Pennsylvania 17011, ALONG WITH the JBC-5B and copies of ALL appropriate commitment papers, confinement papers, and detainers. Section 1 in the JBC-5B must be completed on all prisoners you wish to transfer. Also, Section 2 in the JBC-5B must be completed for any unsentenced or untried prisoners you wish to transfer. Upon approval of the transfer, the Deputy Commissioner will forward the JBC-185, along with necessary documents, to the institution he has approved for the transfer. The JBC-5B will be returned to you UNBURSTED (with the carbons still intact). You will then obtain the Judge's approval, remove only the last carbon and the last sheet for your records, and forward the remaining parts of the JBC-5B UNBURSTED to the institution approved for this transfer with the delivering Sheriff and the prisoner. No transfer will be approved between a county prison and a Bureau of Correction institution UNLESS forms JBC-185 and JBC-5B are completed as outlined above.

COUNTY PRISON NO.	PAROLE BOARD NO.	PRISONER'S NAME	COUNTY PRISON	DATE OF REQUEST
		YURKY: DAVID A.	CLINTON	1/8/82

DETAILED REASON FOR REQUESTING THIS TRANSFER:

SECURITY RISK

THIS PRISONER IS SERVING THE FOLLOWING SENTENCE:

DATE OF SENTENCE	EFFECTIVE DATE	COURT, INDICTMENT NUMBER, TERM	MINIMUM Y	MINIMUM M	MINIMUM D	MAXIMUM Y	MAXIMUM M	MAXIMUM D	JUDGE	OFFENSE

SUMMARY OR REMARKS ON SENTENCE

TOTAL SENTENCE:

COMMITMENT CREDIT

FOLLOWING THE ABOVE SENTENCE, THIS PRISONER HAS THE FOLLOWING DETAINERS:

DATED	FROM (Include address)	CHARGING	INDICT-WARRENT NOS.	REMARKS

THIS PRISONER IS NOT SENTENCED; NOTE THE FOLLOWING:

DATE OF CONFINEMENT	DATE OF CONVICTION	DATE OF TRIAL	INDICTMENT NO., TERM	CHARGING
12/24/81				CRIM. CONSPIRACY CRIM. COMPLICITY

SIGNATURE

Robt O. Miller

TITLE

ASST/WARDEN

CUMULATIVE ADJUSTMENT RECORD

BUREAU OF CORRECTION

SCIH
Institution

INSTITUTIONAL NUMBER	PBP NUMBER	NAME
50471		Yurby

DATE	OBSERVATION
-11-82	PRC Received from Clinton County Held for Clinton Co. Ped dalhouries JAC FNH ECW will be here to take him ATA today. No Pay (Assign Max) Review 2-10-82 ~~Cont~~ A C Max

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

[Entered May 10, 1985]

TO: Mr. David Alan Yurky
Amy Zapp, Esq.
John C. Youngman, Jr., Esquire

NOTICE OF JUDGMENT

This Court's Memorandum/opinion was filed and Judgment was entered today in case No. 84-5636 and copies are enclosed herewith.

NO. 85-236

Supreme Court, U.S.
FILED
OCT 11 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER 1985 TERM

HARRY W. EICHENLAUB,

Petitioner

v.

DAVID ALAN YURKY,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENTS ZIMMERMAN AND WICKER IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

BEST AVAILABLE COPY

LeROY S. ZIMMERMAN
Attorney General

BY: AMY ZAPP
Deputy Attorney
General

ANDREW S. GORDON
Senior Deputy
Attorney General
Counsel of Record

Office of Attorney
General
15th Fl. Strawberry Sq.
Harrisburg, PA 17120

ALLEN C. WARSHAW
Executive Deputy
Attorney General

QUESTION PRESENTED

Whether it was error for the Court of Appeals to hold that the county prison official who actually implemented a pre-trial detainee's transfer to a state prison was responsible for ensuring that any required transfer-related due process was provided.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED.....	i
TABLE OF CONTENTS.....	ii
TABLE OF CITATIONS.....	iii
OPINIONS BELOW.....	1
STATEMENT OF JURISDICTION.....	2
STATUTE INVOLVED.....	3
STATEMENT OF THE CASE.....	4
ARGUMENT.....	9
The Court of Appeals Did Not Err in Concluding that It Was the Responsibility of County--Not State--Prison Officials to Ensure that the Required Transfer-Related Due Process Was Afforded the Prisoner.....	9
CONCLUSION.....	12

TABLE OF CITATIONS

	Page
Cases:	
Cobb v. Aytch, 643 F.2d 946 (3d Cir. 1981).....	6,7
Hewitt v. Helms, 459 U.S. 460 (1983).....	11
Statutes:	
28 U.S.C. § 1254(1).....	2
Civil Rights Act of 1871, as amended, 42 U.S.C. § 1983.....	3,7
Constitutional Provisions:	
United States Constitution, Sixth Amendment.....	6

OPINIONS BELOW

The opinions of the Court of Appeals and of the District Court are unreported. Copies of those opinions may be found in the appendix to the petition for certiorari, respectively, at pages 1a-20a, and 1b-19b.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on May 10, 1985. The petition for writ of certiorari was filed within 90 days of that date, and jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The Civil Rights Act of 1871, as amended, provides in perintent part as follows:

> Every person who, under color of any statute, ordinance, regulation, custom or usage of any State or Territory, or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1976 & Supp. IV 1980).

STATEMENT OF THE CASE

Petitioner, the warden of a Pennsylvania county jail, transferred respondent David Alan Yurky, a pre-trial detainee in his custody,[1] for security reasons, to the Pennsylvania Department of Corrections' State Correctional Institution at Huntingdon, Pennsylvania, at which facility respondents Charles H. Zimmerman and Emanuel C. Wicker were em-

---

[1]At all times relevant to this matter, respondent Yurky was incarcerated as a pre-trial detainee. Since the time of the events which gave rise to this suit, he was convicted of crimes for which he then was charged and is presently a prisoner in state custody. Because there are multiple respondents here, see n. 2, infra, to avoid confusion Yurky will be referred to throughout this brief as "the prisoner."

ployed as prison administrators.[2] The latter respondents, the state prison officials, had no involvement in that transfer, which was effected on an emergency basis.

The applicable operating procedures of the Pennsylvania state prisons provided that it was the obligation of county prison officials transferring pre-trial detainees in their custody to state prisons to comply with procedural protections which might be required under

---

[2]Although the caption of the instant petition does not include respondents Zimmerman and Wicker, they are, in fact, parties to this action, having been co-defendants with the petitioner below. These respondents will be referred to collectively as "the state prison officials" throughout this brief.

the circumstances.[3] In cases of emergency transfers the regulations permitted the necessary process to occur following the transfer. At no time prior to the prisoner's transfer in this case was he provided with the due process required by the Cobb case nor was he afforded that process thereafter.

---

[3]In Cobb v. Aytch, 643 F.2d 946 (3d Cir. 1981), a decision which predated the events on which this suit was based by several months, the Third Circuit Court of Appeals held that a pre-trial detainee had a liberty interest grounded in the federal constitution, specifically, the Sixth Amendment's rights to counsel and speedy trial, in remaining in a county penal facility. Accordingly, it held that, prior to transfer to a state correctional institution, a pre-trial detainee must be afforded notice and an informal, non-evidentiary hearing before a tribu-

FOOTNOTED CONTINUED ON NEXT PAGE

The prisoner brought an action pursuant to 42 U.S.C. § 1983 against the petitioner and the state prison officials claiming, inter alia, that he was denied due process in connection with his transfer from the county jail to a state prison.[4] The District Court, upon cross-motions for summary judgment, ruled that the prisoner was not denied

---

FOOTNOTE CONTINUED FROM PREVIOUS PAGE

nal independent of the prison system. 643 F.2d at 961. In an emergency transfer situation, prompt post-transfer process was permissible. Pursuant to this ruling, regulations were issued which held county prison officials responsible for ensuring the aforementioned process was provided the prisoner to be transferred.

[4]The prisoner raised other claims in the District Court none of which are now the subject of the instant petition.

due process. The Court of Appeals affirmed the District Court's action with respect to the state prison officials, but as to petitioner, it vacated the grant of summary judgment. In doing so, the Court of Appeals held that the prisoner was not provided the transfer-related due process to which he was entitled, Pet. App. at 10a, but it also concluded that the obligation to ensure that such process was provided rested with the transferring county prison officials, namely, the petitioner, and not with the state prison officials who are respondents here. Id. at 10a-13a.

This Petition for Writ of Certiorari followed.

ARGUMENT

THE COURT OF APPEALS DID NOT ERR IN CONCLUDING THAT IT WAS THE RESPONSIBILITY OF COUNTY--NOT STATE--PRISON OFFICIALS TO ENSURE THAT THE REQUIRED TRANSFER-RELATED DUE PROCESS WAS AFFORDED THE PRISONER.

Petitioner also argues here that the Court of Appeals erred when it concluded that it was the obligation of the petitioner, the county official, who actually implemented the transfer of the prisoner--not state prison officials who merely received him into custody--to ensure that the requirements of due process are met. He argues that the Court should have ruled that the obligation was incumbent upon state officials especially in cases of

emergency transfers, as was the situation here, where expediency is required. There is no merit to this argument.[5]

The Court of Appeals properly reasoned that it was the petitioner's obligation to meet the requirements of due process because it was he, in fact, who was the party that sought to deprive the prisoner of his liberty interest in remaining in the county jail and the

---

[5]Petitioner also argues that a pre-trial detainee who has not shown an actual deprivation of the effective assistance of counsel as a result of a transfer has been deprived of no protectible interest and, therefore, is entitled to no hearing procedures. We agree with this result, if not the precise rationale offered by petitioner. Because the issue we address above is dispositive of the state prison officials' liability, they do not address the other issue addressed by petitioner.

party who actually took the action adverse to the prisoner. Moreover, that conclusion was correct also because it was the petitioner alone who possessed the information which served as the basis for the transfer and therefore he was only the party capable of justifying the action taken.

Petitioner's reliance on Hewitt v. Helms, 459 U.S. 460 (1983) for the contrary position is without support. In Hewitt the prisoner at all times was in the custody of state prison officials. Those officials never suggested that they were not the appropriate parties to provide whatever procedures were required. Here, by contrast, there has been a change in custody and, as argued above, it is the local officials who have caused the alleged deprivation who must satisfy due process.

CONCLUSION

For the above-stated reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

LeROY S. ZIMMERMAN
Attorney General

By: AMY ZAPP
Deputy Attorney General

ANDREW S. GORDON
Senior Deputy Attorney General
Counsel of Record

ALLEN C. WARSHAW
Executive Deputy Attorney General Chief, Litigation Section

Counsel for Respondents,
CHARLES H. ZIMMERMAN
EMANUEL C. WICKER

Office of Attorney General
15th Floor
Strawberry Square
Harrisburg, PA 17120
(717) 783-1471

DATE: October 10, 1985

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

ORIGINAL

Supreme Court, U.S.
FILED
NOV 30 1985
JOSEPH F. SPANIOL JR.
CLERK

No. 85-236

IN THE SUPREME COURT OF THE UNITED STATES

1985 Term

HARRY W. EISENBERG,

Petitioner

vs.

DAVID ALAN YURKY,

Respondent

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Respondent, David Alan Yurky, asks leave to file the attached Motion To Rescind Clerk's Order without prepayment of costs and to proceed in forma pauperis. Respondent has previously been granted leave to so proceed in both the U.S. District Court and U.S. Court of Appeals. Respondent's affidavit in support of this Motion is attached hereto.

Respectfully submitted,

David Yurky

David Yurky pro se

AFFIDAVIT OF DAVID YURAY

I, David Yurky, being first duly sworn according to law, depose and say that I am the Respondent in the above-entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said case or to give security therefor; and that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of proceeding in this Court are true.

1. Are you presently employed?

a. Yes. SCI-Huntingdon approximately $40 monthly

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends or other sources?

a. No.

3. Do you own any cash or checking or savings account?

a. Yes. approximately five dollars in prison account

4. Do you own any real estate, stocks, bonds, notes, automobiles or other valuable property (excluding ordinary household furnishings and clothing)?

a. No.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

a. None.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

24th September, 1985
Naomi K. Detwiler

David Yurky
David Yurky pro se

NAOMI K. DETWILER, Notary Public
Huntingdon, Huntingdon Co., Pa.
My Commission Expires Feb. 20, 1989

SUPREME COURT U.S.
NOV 30 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-[illegible]

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER 1985 TERM

HARRY J. LAUGHLAUGH,

Petitioner

vs

DAVID ALAN YURKO,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT YURKO
IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

David Yurky
Drawer R
Huntingdon, PA 16652

QUESTION PRESENTED

Does due process require a hearing before an independent tribunal for a pretrial detainee transferred from a county prison to a state correctional institution on the basis of an emergency transfer as a security risk?

TABLE OF CONTENTS

Page

QUESTION PRESENTED..... i

TABLE OF CONTENTS..... ii

TABLE OF CITATIONS..... iii

OPINIONS BELOW..... 1

STATEMENT OF JURISDICTION..... 2

CONSTITUTIONAL PROVISION INVOLVED..... 3

STATEMENT OF THE CASE..... 4

SUMMARY OF ARGUMENT..... 5

ARGUMENT..... 6

CONCLUSION..... 8

Certificate of Service

TABLE OF CITATIONS

Page

Cases:

Board of Regents vs Roth, 408 U.S. 564 (1972)..... 6

Meachum vs Fano, 427 U.S. 215 (1976)..... 6

Montanye vs Haynes, 427 U.S. 236 (1976)..... 6

Morrissey vs Brewer, 408 U.S. 471 (1972)..... 6

Olim vs Wakinekona, 461 U.S. 238 (1983)..... 7

Vitek vs Jones, 445 U.S. 480 (1980)..... 7

Statutes:

28 U.S.C. 1254(1)..... 2

Constitutional Provisions:

United States Constitution -- Fourteenth Amendment..... 3

OPINIONS BELOW

The Opinions of the Court of Appeals and of the District Court are unreported. Copies of those opinions may be found in the appendix to the petition for certiorari, respectively, at pages 1a-20a, and 1b-19b.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on May 10, 1985. The petition for writ of certiorari was filed within 90 days of that date, and jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment XIV:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The petitioner, Harry W. Eichenlaub, is the Warden of the Clinton County Jail in the Commonwealth of Pennsylvania. The respondent, David Alan Yurky, was arrested on December 23, 1981 and confined at the Clinton County Jail as a pretrial detainee.

On January 8, 1982 Yurky was involuntarily transferred to the State Correctional Institution at Huntingdon, Pennsylvania. At no time prior to the transfer, was Yurky given any explanation or opportunity to be heard. Upon arrival at the state correctional institution, Yurky was confined in administrative segregation.

The Commonwealth of Pennsylvania, by promulgated regulations, requires county prison officials to provide inmates transferred from county facilities to state correctional institutions with a notice and an opportunity to be heard. See Brief For Respondents Zimmerman & Wicker In Opposition To Petition For A Writ Of Certiorari at pages 5 - 7. Under normal conditions, hearings must precede the transfer. id. However, under emergency situations, a post-transfer hearing is permissible. id. In this case, Yurky was provided with neither. id.

Yurky brought suit under 42 U.S.C. 1983 against Eichenlaub and other correctional officials, alleging that his transfer from the Clinton County Jail to the state correctional institution violated his due process rights under the Fourteenth Amendment. The District Court granted petitioner's motion for summary judgment, but the Court of Appeals for the Third Circuit reversed. The appellate Court determined that Yurky was not provided the transfer-related procedures which he was entitled.

This petition for a writ of certiorari followed.

SUMMARY OF ARGUMENT

This petition presents the question of what limits the Due Process Clause of the Fourteenth Amendment places on the discretion of prison officials to transfer an inmate from a county prison to a state correctional institution. Because the question of when due process is required in the context of prison transfers has squarely been resolved by this Court, the petition for certiorari should be denied.

ARGUMENT

The Fourteenth Amendment prohibits a State from depriving a person of life, liberty or property without due process of law. This Court has established the framework within which due process claims must be analyzed. First, it must be determined whether a "liberty" or "property" interest within the meaning of the Due Process Clause is implicated. Board of Regents vs Roth, 408 U.S. 564, 569 (1972). If such an interest exists, the second question is what process must be provided to satisfy due process. Morrissey vs Brewer, 408 U.S. 471, 481 (1972).

In the context of transfers of prisoners from one institution to another, the Supreme Court has thoroughly established the boundaries to which the Due Process Clause requires state officials to provide procedural safeguards. Since the decision below is within the scope of those boundaries, the petition for certiorari should be denied.

In Meachum vs Fano, 427 U.S. 215 (1976), inmates had brought a 1983 action challenging their transfer to less favorable prison facilities without due process of law. This Court held that the Due Process Clause of the Fourteenth Amendment does not entitle a state prisoner to a prior hearing when transferred from one correctional facility to another, absent a state law or regulation conditioning the transfer on proof of misconduct or the occurrence of specific events. id. at 226-228.

Following this was the companion case of Montanye vs Haynes, 427 U.S. 236 (1976). There the Court upheld, against a due process challenge, the transfer of a New York prisoner to less favorable confinement without affording him an opportunity to participate in a fact-finding hearing. The Court declared that not "every disadvantageous transfer must be accompanied by appropriate hearings." id. at 242. Only where the prisoner retains a justifiable expectation, rooted in state law, that a transfer will not occur except for misbehavior or other specified events is due process applicable. id.

Several years later, this Court applied the teachings of Meachum and Montanye to a case in which a Nebraska state prisoner challenged his transfer from a penal institution to a mental hospital. Vitek vs Jones, 445 U.S. 480 (1980). There, the Court held that the prisoner retained an objective expectation, rooted in Nebraska law, that he would not be transferred to a mental hospital unless he suffered from a mental disease or defect that could not be treated in prison. id. at 490. As such, the prisoner retained a liberty interest that entitled him to the benefits of appropriate procedures. id.

Finally, in Olim vs Wakinekona, 461 U.S. 238 (1983), a prisoner challenged his transfer from a state prison in Hawaii to one in California. The Court reiterated its prior rulings that a prisoner is not protected by the Due Process Clause, in and of itself, from institutional transfer. And since Hawaii's prison regulations placed no limitations on the discretion of officials to transfer a prisoner, the state had not created a liberty interest entitling the prisoner to procedural protections.

It is clear that the due process analysis employed by this Court in Meachum and Montanye, and continued through Vitek and Olim, has reamined unchanged. Where a liberty interest is at stake, the prisoner is entitled to those procedures appropriate under the Due Process Clause to insure that the interest is not arbitrarily abrogated. Conversely, where no protectible interest exists, the Constitution does not require transfer hearings.

In this case, the Commonwealth of Pennsylvania has promulgated regulations requiring county prison officials to provide prisoners transferred to state correctional facilities with hearings before the transfer, or in case of emergency conditions, following the transfer. See Brief For Respondents Zimmerman And Nicker In Opposition To Petition For A Writ Of Certiorari at 5-6. This is certainly within the Commonwealth's discretion. Meachum at 229 (individual states "are free" to require pretransfer hearings).

CONCLUSION

This case does not present a constitutional issue of widespread importance. The due process rights of prisoners in the context of institutional transfers has been thoroughly delineated by this Court in Meachum, Montanye, Vitek and Olim. For this reason, the petition for a writ of certiorari should be denied.

Respectfully submitted,

David Yurky

David Alan Yurky
Drawer R
Huntingdon, PA 16652

November 30, 1985

CERTIFICATE OF SERVICE

This is to certify that today, November 30, 1985, I, David Yurky caused a copy of this Brief For Respondent Yurky In Opposition To Petition For A Writ Of Certiorari to be deposited in the United States Mail at Huntingdon, Pennsylvania addressed to each of the following:

John C. Youngman, Jr.
Candor, Youngman, Gibson & Gault
P.O. Box 1507
Williamsport, PA 17703-1507

Andrew S. Gordon, Esquire
Senior Deputy Attorney General
15th Floor Strawberry Square
Harrisburg, PA 17120

David Yurky

David Yurky pro se

Supreme Court, U.S.
FILED
MAR 27 1986
JOSEPH F. SPANIOL, JR.
CLERK

NO. 85-236

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

HARRY EICHENLAUB,
Petitioner

v.

DAVID ALAN YURKY,
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENTS ZIMMERMAN AND WICKER IN PARTIAL SUPPORT OF PETITIONER

BEST AVAILABLE COPY

CORRECTED COPY

LeROY S. ZIMMERMAN
Attorney General

AMY ZAPP
Deputy Attorney General

JOHN G. KNORR, III
Senior Deputy Attorney General

ANDREW S. GORDON
Chief Deputy Attorney General
Counsel of Record

Counsel for Respondents
Zimmerman and Wicker

Office of Attorney General
15th Floor Strawberry Square
Harrisburg, PA 17120
(717) 783-1471

QUESTION PRESENTED

Whether a pre-trial detainee who is transferred from a county jail to another prison for security reasons is entitled to a hearing prior to or shortly after the transfer to protect his rights to effective assistance of counsel and a speedy trial when the detainee has available to him in the pending criminal proceeding adequate measures to safeguard his Sixth Amendment rights.

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
I. Constitutional Provision Involved	3
II. Statute Involved	4
STATEMENT OF THE CASE	5
SUMMARY OF ARGUMENT	19
ARGUMENT	
I. A PRE-TRIAL DETAINEE WHO IS TRANSFERRED FROM A COUNTY JAIL TO ANOTHER PRISON NEED NOT BE AFFORDED A HEARING SPECIFICALLY TO SAFEGUARD HIS SIXTH AMENDMENT RIGHTS TO COUNSEL AND SPEEDY TRIAL BECAUSE HE HAS ADEQUATE, EXISTING MEANS AVAILABLE TO HIM AS PART OF THE CRIMINAL JUSTICE PROCESS TO ENFORCE THOSE RIGHTS . . .	22

TABLE OF CONTENTS

		PAGE
A.	Introduction	22
B.	A Pre-Trial Detainee who is Transferred From A County Jail to a State Prison is Fully Able to Enforce His Sixth Amendment Rights to Counsel and Speedy Trial As Part of His Pending Criminal Action and No Additional Process for That Purpose Is Required	26
C.	A Pre-Trial Detainee Should Be Required To Enforce His Sixth Amendment Rights As Part of His Pending Criminal Action Because Any Determination Regarding Those Rights Must Necessarily Be Based on The Particular Facts of That Case	34
D.	Creation of a Separate System to Safeguard a Defendant's Sixth Amendment Rights Is Likely to Produce Undesirable Confusion and Conflict	40

TABLE OF CONTENTS

PAGE

II. IF DESPITE THE FOREGOING REASONS THIS COURT CONCLUDES THAT A PRE-TRIAL DETAINEE SHOULD BE AFFORDED THE ADDITIONAL PROCESS MANDATED BY THE COURT OF APPEALS, THE COURT SHOULD ALSO CONCLUDE THAT IT IS THE OBLIGATION OF COUNTY NOT STATE OFFICIALS TO PROVIDE THAT PROCESS 43

CONCLUSION 47

ADDENDUM

TABLE OF AUTHORITIES

Cases	Page
Argersinger v. Hamlin, 407 U.S. 25 (1972)	34, 35
Barker v. Wingo, 407 U.S. 514 (1972)	35, 36, 37, 39
Bell v. Wolfish, 441 U.S. 520 (1979)	23
Carey v. Piphus, 435 U.S. 247 (1978)	44
Chambers v. Maroney, 399 U.S. 42 (1970)	35
Cobb v. Aytch, 643 F.2d 946 (3d Cir. 1981)	17, 18, 24
Commonwealth v. Baines, 480 Pa. 26, 389 A.2d 68 (1978)	30
Commonwealth v. Sheehan, 446 Pa. 35, 285 A.2d 465 (1971)	32
Commonwealth v. Yurky, No. 2-82 (Clinton Co., filed Apr. 22, 1983)	14, 30
Commonwealth ex rel. Shadd v. Myers, 423 Pa. 82, 223 A.2d 296 (1966)	31

TABLE OF AUTHORITIES

Cases	Page
Gerstein v. Pugh, 420 U.S. 103 (1975)	22
Gideon v. Wainwright, 372 U.S. 335 (1963)	23, 35
Klopfer v. North Carolina, 386 U.S. 213 (1967)	23, 24 35
Maine v. Moulton, No. 84-786 (Dec. 10, 1985)	24
Morris v. Slappy, 461 U.S. 1 (1983)	35, 37
Olim v. Wakinekona, 461 U.S. 238 (1983)	28
Powell v. Alabama, 287 U.S. 45 (1932)	23, 24
Strickland v. Washington, 466 U.S. 668 (1984)	35, 36
United States v. Marion, 404 U.S. 307 (1971)	22
United States v. Morrison, 449 U.S. 361 (1981)	38

Statutes

28 U.S.C. § 1254(1)	2
28 U.S.C. § 2254	33

TABLE OF AUTHORITIES

Statutes — Page

Civil Rights Act of 1871, as amended, 42 U.S.C. § 1983 (Supp. III 1979) 4, 15

Pennsylvania Post Conviction Hearing Act, 42 Pa. Cons. Stat. §§ 9541-9551 (Purdon 1982) 32

Pa. Stat. Ann. tit. 61, § 72 (Purdon Supp. 1985), as amended by Pa. Stat. Ann. tit. 71, § 310.1 (Purdon Supp. 1985) 8

Pa. Stat. Ann. tit. 61, § 74 (Purdon Supp. 1985) 9

Regulations

37 Pa. Code § 93.3(a) 13
37 Pa. Code § 93.13(a) 13
37 Pa. Code § 93.22(a) 12
37 Pa. Code § 93.22(b) 12
37 Pa. Code § 93.24 12
37 Pa. Code § 93.25 12
37 Pa. Code § 93.71 13
37 Pa. Code § 93.72 13
37 Pa. Code § 93.73 13
37 Pa. Code § 93.74 13
37 Pa. Code § 93.75 13
37 Pa. Code § 93.76 13

TABLE OF AUTHORITIES

Constitutional Provisions	Page
United States Constitution, Sixth Amendment	passim

Procedural Rules	
Pennsylvania Rules of Criminal Procedure, Rule 306	28
Pennsylvania Rules of Criminal Procedure, Rule 307	28
Pennsylvania Rules of Criminal Procedure, Rule 1100.	31
Pennsylvania Rules of Criminal Procedure, Rule 1123.	31

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

NO. 85-236

HARRY EICHENLAUB,
Petitioner

v.

DAVID ALAN YURKY,
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENTS ZIMMERMAN AND WICKER IN PARTIAL SUPPORT OF PETITIONER

OPINIONS BELOW

The opinions of the Court of Appeals and the District Court are unreported. Copies of those opinions are reproduced in the appendix to the petition for certiorari, respectively, at pages 1a-20a, and 1b-16b.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on May 10, 1985. The petition for writ of certiorari was filed within 90 days of that date, and the writ was granted on January 13, 1986. This Court has jurisdiction of this matter pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

I. Constitutional Provision Involved

The Sixth Amendment to the Constitution provides in relevant part as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. Const. amend. VI.

II. Statute Involved

The Civil Rights Act of 1871, as amended, provides in pertinent part as follows:

> Every person, who under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (Supp. III 1979).

STATEMENT OF THE CASE

On January 8, 1982, petitioner Harry W. Eichenlaub, warden of the Clinton County Jail, (J.A. 78-79),[1] transferred respondent, David Alan Yurky, a pre-trial detainee in his

---

[1] "J.A." refers to the Joint Appendix submitted by the parties. The designation, "P.A.", used throughout this brief, refers to the appendix to the petition for certiorari. Where a pertinent portion of the record is not reproduced in either place, citation will be made directly to the document referenced. Because in some instances the record contains more than one affidavit or unsworn declaration from the same individual, the document referenced will be identified by date where appropriate.

custody,[2] to the State Correctional Institution at Huntingdon, Pennsylvania, a state prison some 60 miles away.[3] Respondents Charles H. Zimmerman and Emanuel C. Wicker were employed as prison administrators at the state

---

[2]At all times relevant to this action, Yurky was incarcerated as a pre-trial detainee. See (Affidavit of David A. Yurky, dated March 28, 1984, at ¶¶ 1-5). He was convicted of the crimes with which he was then charged and is presently a prisoner in state custody.

[3]The District Court took judicial notice of the various distances involved in this case, (P.A. 19b), and the relevant information is summarized here. A detailed discussion of those distances can be found in the Brief in Opposition to Plaintiff's Motion for Partial Summary Judgment and in Support of Cross-Motion of Defendants Zimmerman and Wicker for Summary Judgment, filed April 16, 1984, at p. 5, n. 9 and p. 13, n.17. The Court of Appeals did not dispute either the District Court's action in this respect or the relevant information.

prison.[4] Eichenlaub carried out the transfer on an emergency basis for security reasons[5] with the prior

---

[4]For all times relevant here, respondents Zimmerman and Wicker were employed, respectively, as Superintendent and Deputy Superintendent for Operations at the state prison. (J.A. 95, 103). These respondents will be referred to collectively as "the state prison officials" throughout this brief.

[5]Eichenlaub took this action based on staff reports that Yurky's conduct in the jail indicated he might be planning to escape and on information he received from the state police, which indicated that Yurky had ties to the Palestine Liberation Organization; was skilled in the martial arts; was in possession of a passport to Lebanon at the time of his arrest; had criminal charges pending against him in Centre County; had exceptionally high bail set; and was expected to be charged in federal court with bank robbery in the near future. In his judgment, the county jail, an older, minimum security facility, was not secure enough to house Yurky. Eichenlaub rejected other options such as a transfer to a neighboring county jail or to a closer minimum security state prison for the same reason. (J.A. 62-66; 75-76).

approval of the Clinton County Court of Common Pleas.[6] (J.A. 61-66). Neither of the state prison officials had any involvement in the decision to transfer Yurky, and they were required by state law to receive him into their custody.[7]

---

[6]Pennsylvania law requires that the court of common pleas for the county in which a jail is located give its consent prior to the transfer of a prisoner from the county jail to a state prison. See Pa. Stat. Ann. tit. 61, § 72 (Purdon Supp. 1985). That consent may be obtained ex parte. Prior to transferring Yurky, Eichenlaub contacted a judge of the Clinton County Court of Common Pleas by telephone and relayed the reasons for the transfer. The judge orally approved the transfer at that time and signed the appropriate document the next business day. (J.A. 62-65; Declaration of Curtis C. Carson at Exhibit III).

[7]Under Pennsylvania law, only the Deputy Commissioner of the state Department of Corrections may authorize the transfer of a prisoner from a county jail. See Pa. Stat. Ann. tit. 61, § 72 (Purdon Supp. 1985), as amended by Pa. Stat. Ann. tit. 71, § 310.1 (Purdon Supp. 1985). That individual approved Yurky's transfer here. (J.A. 66-67).

(FOOTNOTE CONTINUED ON NEXT PAGE)

At the time of the transfer, Yurky had criminal actions pending against him in two different counties. He had had a preliminary hearing earlier the same day in Clinton County on charges of conspiracy and criminal complicity. Immediately following that proceeding, Yurky was arraigned in a neighboring jurisdiction, Centre County, on robbery charges. (Affidavit of David A. Yurky, dated March 28, 1984, at ¶¶ 1-4).

(FOOTNOTE CONTINUED)

When a transfer has been approved by the Deputy Commissioner, the administrators of a particular state prison, such as the state officials here, may not refuse to accept custody of the prisoner. See Pa. Stat. Ann. tit. 61, § 74 (Purdon Supp. 1985), and (J.A. 95-97; 103-04).

Yurky's counsel in the Clinton County matter was an attorney located in the same town as the county jail.[8] As the result of the transfer, Yurky was incarcerated a little more than an hour's drive away from his attorney. A different attorney, from a town about 25 miles away from the Clinton County Jail, represented him on the Centre County charges.[9] The transfer to the state

---

[8]The Clinton County Jail and Yurky's attorney on the Clinton County charges were both located in Lock Haven, Pennsylvania. See (Complaint at p. 4; in Yurky's Response to the Commonwealth Defendants' Interrogatories, filed November 18, 1982, at p. 18, no. 17; and Affidavit of David Yurky dated April 26, 1984 at ¶ 9).

[9]Yurky's Center County Attorney was located in Bellefonte, Pennsylvania. (Yurky's Response to the Commonwealth Defendants' Interrogatories, filed November 18, 1982, at p. 18, no. 17; Affivdavit of David Yurky, dated April 26, 1984 at ¶ 10).

prison increased the distance between Yurky and his counsel in that case by only about 15 miles.

At no time before or after the transfer was Yurky provided with a hearing specifically for the purpose of considering what effect the transfer might have on his Sixth Amendment rights to counsel and speedy trial in either of his pending criminal matters.[10]

---

[10]Not long after Yurky's arrival at the state prison, an institutional hearing was held relating to his placement within the prison. It did not in any way concern the propriety of his transfer but was strictly limited to the question of custodial classification. (Declaration of Terry W. Henry).

While at the state prison, Yurky had a virtually unlimited ability to correspond with his attorneys[11] and

---

[11]The state prison regulations then in effect provided all prisoners with a monthly allotment of free postage and placed no limit on the amount of postage-paid correspondence a prisoner could send. See 37 Pa. Code §§ 93.22(a) and (b). (Copies of relevant regulations may be found in the Addendum to this brief.) If an inmate wished to send legal mail such as correspondence to his attorney but had exhausted his monthly postage allotment and had no funds to pay for postage, the prison would post the correspondence and allow him to pay for the postage at a later time when he had funds to do so. (J.A. 99-101). A prisoner's mail to and from an attorney was treated as privileged and, absent certain extraordinary circumstances not involved here, was opened only in his presence and only to check for contraband. See 37 Pa. Code §§ 93.24-93.25.

During Yurky's first month at the state prison, he received legal mail on five different occasions. (Declaration of Curtis C. Carson at ¶¶ 15(h) and Exhibit V).

could receive visits from them.[12] He was also permitted to place telephone calls.[13]

Yurky was convicted in both counties of the crimes with which he had been charged. The record does not reflect that Yurky ever contended in the trial court or in his direct appeals that his Sixth Amendment rights had been

---

[12]State regulations not only permitted Yurky to receive visits from his attorneys in circumstances that preserved the confidentiality of communications but also allowed visits to be arranged outside of normal visiting hours. See 37 Pa. Code §§ 93.3(a) and 93.71-93.74. There is no contention here that Yurky was ever denied a visit from any of his attorneys at the state prison.

[13]An inmate's counsellor determined the number and frequency of phone calls permitted for the prisoner. See 37 Pa. Code § 93.13(a). In his first month at the state prison, Yurky was permitted two calls. (Declaration of Curtis C. Carson at ¶ 15(g) and Exhibit V). The record here reflects no emergency situation relating to either of his pending criminal matters which necessitated communication by telephone.

violated. In post-verdict motions relating to his Clinton County conviction, he contended, inter alia, that he had been denied the effective assistance of counsel as the result of his transfer from the county jail to the state prison. He asserted that the transfer and resulting conditions of confinement at the state prison impeded his ability to participate effectively in pre-trial preparation with his attorney. The court rejected his claim and found, to the contrary, that Yurky had been afforded the effective assistance of counsel. See Commonwealth v. Yurky, No. 2-82, slip op. at 13-16 (Clinton Co., filed Apr. 22, 1983).[14]

---

[14] A copy of this opinion was appended to the Brief of Harry W. Eichenlaub in Opposition to Plaintiff's Motion for Summary Judgment and in Support of Harry W. Eichenlaub's Motion for Summary Judgment, filed May 10, 1984.

On May 26, 1982, the prisoner commenced this suit, a civil rights action pursuant to 42 U.S.C. § 1983 against the petitioner, the state prison officials named here, and several other county and state officials,[15] claiming, inter alia, that he was denied due process because he was not given a hearing at or near the time of his transfer on the effect of that transfer on his Sixth Amendment rights; and that, as a result of the transfer, he was denied the effective assistance of counsel in the criminal matters then pending against him.[16]

---

[15]These additional officials were dismissed in the preliminary stages in this suit, and their dismissal is not now questioned.

[16]He also raised claims pertaining solely to the dismissed defendants which were also dismissed, and a due process claim against the state prison officials relating to his placement in the state prison that is not before the Court.

On cross-motions for summary judgment, the District Court concluded that in neither respect had the prisoner's rights been violated and entered judgment for Eichenlaub and the state prison officals. (P.A. 6b-12b, 186-19b). The Court of Appeals affirmed the District Court's judgment on the effective assistance of counsel claim. (P.A. 17a-18a). On the transfer-related due process claim, it affirmed the District Court as to the state prison officials, holding that those officials had no obligation to provide any necessary process. (P.A. 12a-13a). However, as to Eichenlaub, it reversed the District Court's judgment. (P.A. 8a-12a).

The Court of Appeals held that Eichenlaub was required by the Sixth Amendment to provide Yurky with a hearing, independent of the prison system, specifically for the purpose of evaluating the effect of his transfer on his rights to effective assistance of counsel and speedy trial in his pending criminal actions. The Court of Appeals reiterated its earlier holding in Cobb v. Aytch, 643 F.2d 946 (3d Cir. 1981), that the Sixth Amendment requires that before (or in emergency situations immediately after) a pre-trial detainee is transferred from a county jail to a state prison, he be afforded notice and a hearing before a tribunal independent of the prison system to weigh the need for the transfer against the possible detriment to the defendant's Sixth Amendment rights. The hearing mandated

by Cobb, and required here, is a hearing separate from and in addition to the detainee's pending criminal proceedings. (P.A. 8a-12a).[17]

The petitioner's request for a writ of certiorari was granted on January 13, 1986.

---

[17]In Cobb the Court did not indicate what tribunal should afford the hearing. Because, as we have previously mentioned, Pennsylvania law relating to transfers of county jail prisoners requires the prior consent of the county court of common pleas, the Court of Appeals suggested that court as an appropriate tribunal but did not so require. See 643 F.2d at 961. Thus, under its ruling, any type of tribunal so long as it is independent of the prison system will suffice. However, regardless of whether the hearing is provided by the court suggested in Cobb or by another entity, the net effect is identical--an additional, separate hearing must be afforded a defendant to evaluate the effect of a transfer on his Sixth Amendment rights.

SUMMARY OF ARGUMENT

I. Whenever a pre-trial detainee is transferred from a county jail to another prison and believes that, as the result of the transfer, he is being deprived of his Sixth Amendment rights to effective assistance of counsel or a speedy trial, he may seek relief in his pending criminal action. The separate, additional process mandated by the Court of Appeals prior to a transfer is, in light of those existing rights, completely unnecessary.

Moreover, it is especially appropriate that a detainee be required to enforce his Sixth Amendment rights as part of his pending criminal action because any determination of whether those rights have been violated necessarily turns on the particular

facts of his case. The trial court before which that matter is pending, being familiar with pertinent developments, is best able to make an informed decision in a relatively efficient manner. For these reasons, this Court should reject the separate system of transfer-related procedures created by the Court of Appeals, and should reverse its judgment as to the petitioner.

II. If, in the alternative, this Court determines that the separate system of process required by the Court of Appeals should have been afforded to Yurky, it should also conclude that it was petitioner, the county official responsible for transferring him, not the state officials who merely received

them into their custody, who had the responsibility to ensure that the required process was afforded. That there was an emergency transfer in this case is irrelevant; transferring county officials who have first-hand knowledge of the reasons for a transfer are best able to articulate the need for the transfer before an appropriate tribunal.

ARGUMENT

I. A PRE-TRIAL DETAINEE WHO IS TRANSFERRED FROM A COUNTY JAIL TO ANOTHER PRISON NEED NOT BE AFFORDED A HEARING SPECIFICALLY TO SAFEGUARD HIS SIXTH AMENDMENT RIGHTS TO COUNSEL AND SPEEDY TRIAL BECAUSE HE HAS ADEQUATE, EXISTING MEANS AVAILABLE TO HIM AS PART OF THE CRIMINAL JUSTICE PROCESS TO ENFORCE THOSE RIGHTS.

A. Introduction

This Court has made it clear that a person accused of a crime may be incarcerated before any adjudication of guilt. See Gerstein v. Pugh, 420 U.S. 103, 111-14 (1975); United States v. Marion, 404 U.S. 307, 320 (1971). As a consequence of that incarceration, pre-trial detainees are subject to the legitimate measures employed by prison administrators to achieve the "essential

goals" of maintaining institutional security and preserving order and discipline. Bell v. Wolfish, 441 U.S. 520, 546-48 (1979). When, because of concerns for security, it becomes necessary to transfer a pre-trial detainee to another prison, there may be an effect on the detainee's Sixth Amendment rights to effective assistance of counsel, see Gideon v. Wainwright, 372 U.S. 335 (1963); Johnson v. Zerbst, 304 U.S. 458 (1938); Powell v. Alabama, 287 U.S. 45 (1932), and a speedy trial, see Klopfer v. North Carolina, 386 U.S. 213 (1967).

As the result of a transfer, a detainee may have insufficient pre-trial access to his attorney for the formulation and preparation of his defense and thus be denied the effective

assistance of counsel.[18] See Maine v. Moulton, No. 84-786, slip op. at 9 (Dec. 10, 1985); Powell v. Alabama, 287 U.S. at 59. Or disposition of the charges pending against him might be unduly prolonged. Klopfer v. North Carolina, 386 U.S. at 221-26. This case presents the question of what means are constitutionally required to protect their rights.

The Court of Appeals, relying on its decision in Cobb v. Aytch, 643 F.2d 946 (3d Cir. 1981), held that the

---

[18]Clearly, not every transfer will be detrimental to a detainee. To the contrary, the result may be salutory. He might be moved to a prison with the same or closer proximity to his counsel or may enjoy greater access to his attorney as the result of the operational procedures at the new prison.

Constitution requires that a hearing be held before a tribunal independent of the prison system before a pre-trial detainee may be transferred. In so holding, that court has mandated the creation of a procedural mechanism outside the inter-prison transfer system and apart from the procedures that are available in the underlying criminal proceeding. What this conclusion ignores is that the constitutional rights to counsel and speedy trial in criminal proceedings are enforceable as a part of the pending criminal action. As we show below, it makes no sense, either constitutionally or practically, to mandate creation of a separate system to safeguard the defendant's rights.

B. A Pre-Trial Detainee Who is Transferred From A County Jail to a State Prison is Fully Able to Enforce His Sixth Amendment Rights to Counsel and Speedy Trial As Part of His Pending Criminal Action and No Additional Process for That Purpose Is Required

In requiring that a pre-trial detainee be provided separate, transfer-related process to protect his rights to effective assistance of counsel and a speedy trial, the Court of Appeals inexplicably ignored the critical fact that the detainee has at his disposal adequate means to enforce those rights as part of his pending criminal action. The separate procedures mandated by the Court of Appeals are purely duplicative and unnecessary.[19]

---

[19]The Court of Appeals seems to have reasoned that the Sixth Amendment creates a liberty interest in favor of

(FOOTNOTE CONTINUED NEXT PAGE)

Whenever a detainee who is transferred to another place of incarceration believes that, because of the transfer, he is being denied his rights to effective assistance of counsel or a speedy trial, he or his attorney may promptly rectify the situation by requesting appropriate

---

(FOOTNOTE CONTINUED)

pre-trial detainees requiring notice and a hearing prior to (or shortly after) a transfer. Quite apart from the impracticality of this result which we discuss in the text, the Court of Appeals' decision apparently proceeds on the flawed premise that so long as a hearing is held and the transfer is sufficiently rational to pass due process standards, a detainee's Sixth Amendment rights may be compromised. This result demonstrates the incongruity of creating procedural requirements separate from the criminal proceeding in which Sixth Amendment concerns are paramount.

relief from the court in which the criminal charges are pending.[20] See Pa. R.Crim.P. 306.[21] For example, if

---

[20]The Court of Appeals expressly imposed a requirement for a "prior" or "prompt" hearing. (P.A. 8a). Absent a state created liberty interest, a prison transfer does not itself amount to a deprivation of liberty. Olim v. Wakinekona, 461 U.S. 238 (1983), and as the decision below demonstrates (P.A. 17a-18a), a transfer does not invariably (or even frequently) deprive a detainee of his Sixth Amendment rights. The pending criminal proceeding offers a tranferred prisoner a forum for prompt review prior to any meaningful diminution of his Sixth Amendment Protections.

[21]The Pennsylvania rules of criminal procedure not only permit, but require, a defendant to bring all requests for pre-trial relief to the attention of the court in which charges are pending in a prompt manner. While those rules contemplate the filing of a single, omnibus motion within 30 days of a defendant's arraignment, they allow for additional pre-trial requests where neither the grounds nor the opportunity for filing a request for relief existed within the specified period of time. Other than the above restrictions as to form and time for filing, the rules of procedure contain no limitation on obtaining relief prior to trial which is necessary to cure a problem resulting from a detainee's transfer to another institution. See Pa. R.Crim.P. 306 and 307.

preparation of the case requires that the detainee have greater access to his attorney than the prison in which he is confined allows, he or his attorney may request that the trial court direct prison administrators to permit his attorney additional access.

Similarly, if the problem is that increased distance between the detainee and his counsel prevents them from conferring with sufficient frequency prior to trial, he or his attorney can ask the trial court to fashion an appropriate remedy. The detainee could be moved, possibly on a temporary basis, to another institution closer to his counsel; or, if he has court-appointed counsel, a request can be made that the court allot additional funds for travel by his attorney to the place of confinement. Thus, by requesting appropriate relief from the court in

which criminal charges are pending, a detainee can promptly and fully enforce his right to effective assistance of counsel as part of the ongoing criminal proceedings.[22]

Additionally, there is no question that a detainee may also enforce his right to a speedy trial in precisely the same manner. See Commonwealth v. Baines, 480 Pa. 26, 389 A.2d 68 (1978). In Pennsylvania, the right to a speedy trial generally requires that a defendant be brought to trial within 180 days of the date on which the

---

[22]In Yurky's post-conviction proceedings stemming from his Clinton County conviction, the Court implicitly acknowledged that Yurky could have brought any impairment of his right to counsel caused by his transfer to its attention pre-trial, but did not. Commonwealth v. Yurky, slip op. at 15.

criminal complaint is filed. See Pa. R.Crim.P. 1100. The Pennsylvania Supreme Court stated in Baines that where a defendant is not brought to trial within that period of time and no extension of time has been granted, the appropriate remedy is for the defendant to file a pre-trial motion for relief.

Following trial, if the detainee is ultimately convicted, he may seek redress in a number of ways for any claimed deprivation of his rights resulting from a transfer. First, he may raise a claim of this sort as part of post-verdict motions, see Pa. R.Crim.P. 1123, and thereafter, in a direct appeal. See Commonwealth ex rel. Shadd v. Myers, 423 Pa. 82, 89-90, 223 A.2d 296, 300 (1966) (acknowledging that a criminal defendant has an absolute right to appeal from a conviction and

judgment of sentence). Depending on the particular circumstances of his case, he may be able to pursue other statutory or common law post-conviction remedies as well. See 42 Pa. Cons. Stat. Ann. §§ 9541- 9551 (Purdon 1982).[23] After

---

[23]The Pennsylvania Post Conviction Hearing Act, 42 Pa. Cons. Stat. Ann. §§ 9541-9551 (Purdon 1982), expressly creates post-conviction procedures to redress deprivations of due process which generally replace common law writs of habeas corpus and coram nobis. See 42 Pa. Cons. Stat. Ann. § 9542 (Purdon 1982). That act permits individuals who are convicted and incarcerated or are on probation or parole, to obtain review of claimed deprivations of due process in their criminal actions, if the claims have not been finally litigated, or waived. See 42 Pa. Cons. Stat. Ann. §§ 9543-44 (Purdon 1982). Individuals who have been convicted but who have not received any of the above sentences, and who are therefore outside the provisions of the act, may nevertheless, use common law writs of habeas corpus and coram nobis to seek redress. See Commonwealth v. Sheehan, 446 Pa. 35, 285 A.2d 465 (1971).

he has exhausted his available state remedies, he may then seek review in federal habeas corpus proceedings. See 28 U.S.C. § 2254.

With all of these avenues already available to a pre-trial detainee to enforce his Sixth Amendment rights, it is clear that the additional process required by the Court of Appeals serves no good or valid purpose. This being the case, the Court should reject the conclusion of the Court of Appeals that a hearing, separate from and in addition to procedures available in the pending criminal action, should have been provided Yurky to safeguard his Sixth Amendment rights.

C. A Pre-Trial Detainee Should Be Required To Enforce His Sixth Amendment Rights As Part of His Pending Criminal Action Because Any Determination Regarding Those Rights Must Necessarily Be Based on The Particular Facts of That Case.

Because the Sixth Amendment rights involved here are inextricably related to the due process guaranteed a criminal defendant by the Constitution, it is especially appropriate that the court in which criminal charges are pending consider any claim that the defendant has been deprived of those rights as the result of a transfer to another prison.

Both the right to effective assistance of counsel and the right to speedy trial exist as components of a criminal defendant's constitutional right to due process. Argersinger v.

Hamlin, 407 U.S. 25 (1972); Klopfer v. North Carolina, 386 U.S. at 993; Gideon v. Wainwright, 372 U.S. at 342-45. What each of these rights means, in practical terms, requires a case-by-case determination. Strickland v. Washington, 466 U.S. 668, 690 (1984); Barker v. Wingo, 407 U.S. 514, 519-28 (1972).

"Not every restriction on counsel's time or opportunity to investigate, or to consult with his client or otherwise to prepare for trial violates a defendant's Sixth Amendment right to counsel." Morris v. Slappy, 461 U.S. 1, 11 (1983), citing Chambers v. Maroney, 399 U.S. 42, 53-54 (1970). Similarly, not every delay in the criminal proceedings deprives a defendant of his right to a speedy trial. Barker v. Wingo, 407 U.S.

at 519-23. Whether particular events or circumstances effectively deny a defendant either of those rights must be judged on the facts of each case.[24]

The court in which criminal charges are pending has the best perspective from which to make an informed decision about whether a change in a detainee's place of confinement truly deprives the detainee of his Sixth Amendment rights. Because the related

---

[24]In this respect, this Court pointed out in Strickland that claims of ineffective assistance of counsel must be measured in terms of whether on the facts of a given case an attorney's conduct was outside the "wide range of professionally competent assistance." 466 U.S. at 690. Similarly, in Barker, the Court observed that speedy trial cases require ad hoc review and the application of a four-factor balancing test focusing on certain critical facts in each case, namely: "Length of delay, reason for delay, defendant's assertion of his right [to a speedy trial] and prejudice to the defendant." 407 U.S. at 530.

criminal action is before it, the trial court necessarily has, or has ready access to, the information which typically figures in a determination of that kind, such as the exact nature of the charges, when they were commenced, when the defendant obtained counsel, and the general history and current status of the action. See Morris v. Slappy, 461 U.S. at 11-12; Barker v. Wingo, 407 U.S. at 530-33. It is therefore able to render a decision based upon accurate information in a relatively efficient manner.

In light of this, it is in the interest of judicial economy to require that a pre-trial detainee enforce his Sixth Amendment rights as part of his criminal action. This result obviates the need for another tribunal, which has

little or no familiarity with his criminal action, to expend time, effort and resources gathering and scrutinizing the relevant information. It also minimizes the possibility that a different tribunal will render a decision based on erroneous or mistaken information.

The criminal court not only has the best capability for making an informed decision, but it has an inherent interest in doing so because it is charged with ensuring the integrity of the due process afforded a criminal defendant. Since deprivation of a defendant's Sixth Amendment rights may require repetition of the process, see United States v. Morrison, 449 U.S. 361, 364-65 (1981), resulting in additional

expenditure of time, effort and resources for all concerned, or may mean that a culpable person is not brought to justice,[25] the Court has an interest in properly resolving any claim by a pre-trial detainee that a transfer to another place of incarceration has deprived him of the Sixth Amendment rights dicussed here.

---

[25]In Barker v. Wingo, 407 U.S. at 523, this Court observed that the remedy for denial of the right to a speedy trial is a comparatively harsh one, dismissal of the charges.

D. Creation of a Separate System to Safeguard a Defendant's Sixth Amendment Rights Is Likely to Produce Undesirable Confusion and Conflict

The separate system contemplated by the Court of Appeals to safeguard a defendant's Sixth Amendment rights is not only pointless, it can lead to practical problems which cannot be overlooked. Where, as here, a pre-trial detainee is transferred to another prison on an emergency basis, he would be able, following that transfer, to challenge the action as violative of his Sixth Amendment rights before two different tribunals--the court in which criminal charges are pending, in the manner we have previously discussed, as well as in the post-transfer hearing mandated by the Court of Appeals before a different tribunal independent of the

prison system. Very possibly, two different decisions may be reached. The criminal court may, after review of the record of his case to date, conclude that the transfer is permissible while the other tribunal may conclude it is not. In that situation, prison administrators would be at a loss to know what action they take.

Furthermore, the possible conflict resulting from implementation of the separate system established by the Court of Appeals also raises other potential complications such as what preclusive effect the transfer-related hearing may have in other litigation including the detainee's criminal action and matters such as civil rights suits. Where, as we have discussed above, issues of fact are resolved in a conflicting manner by the different

tribunals, confusion will invariably result as to what should be considered the true facts of the case.

In light of these potential complications and the fact that a detainee has other available means to enforce his Sixth Amendment rights, it fairly can be concluded that the additional requirement of transfer-related due process mandated by the Court of Appeals presents the potential for more harm than good and, therefore, should not be endorsed by this Court.

II. IF DESPITE THE FOREGOING REASONS THIS COURT CONCLUDES THAT A PRE-TRIAL DETAINEE SHOULD BE AFFORDED THE ADDITIONAL PROCESS MANDATED BY THE COURT OF APPEALS, THE COURT SHOULD ALSO CONCLUDE THAT IT IS THE OBLIGATION OF COUNTY NOT STATE OFFICIALS TO PROVIDE THAT PROCESS.

We have advanced here numerous reasons why this Court should reverse the decision of the Court of Appeals in this case. If notwithstanding those reasons, this Court determines that the process mandated by the Court of Appeals should have been provided to Yurky, it should affirm that court's related conclusion that it was Eichenlaub's responsibility, not the state prison officials', to ensure that the necessary process was provided.[26]

---

[26]As we have mentioned previously, the Court of Appeals affirmed the conclusion of the District Court that

(FOOTNOTE CONTINUED ON NEXT PAGE)

This requirement is both logical and practical. In cases of non-emergency transfers, there is no question that it is the responsibility of county officials to provide the prisoner with the process due. Eichenlaub has never disputed this. In emergency situations, the same considerations obtain, only the time sequence is different.

As the officials who seek to remove a prisoner from their custody, county prison authorities have first-hand knowledge of the reasons for which

(FOOTNOTE CONTINUED)

Yurky was not denied the effective assistance of counsel as the result of his transfer. Yurky did not seek review of that decision and therefore it must now be viewed as final. Because it has been determined that he suffered no actual harm as the result of a transfer without process, at most he can recover only nominal damages for a denial of due process here. See Carey v. Piphus, 435 U.S. 247, 266-67 (1978).

the transfer is being carried out and, therefore, are best able to articulate the need for the transfer before the appropriate tribunal.

Officials of the state prison are in an entirely different position. Since they have no part in arranging the transfer of a pre-trial detainee, but only accept him into their custody, they must necessarily rely on information relayed to them by the county surrounding the need for the transfer.[27]

---

[27]The Court of Appeals' decision is also consistent with the uncontroverted record which reflects that under the state's administrative procedures which were in effect at the time of Yurky's transfers, county prison officials were responsible for ensuring that any process due a detainee be provided, including in situations of emergency transfers. See (Declaration of Glen R. Jeffes, at ¶¶ 7-8 and Exhibit I).

In view of these considerations, the Court of Appeals correctly concluded that transferring county officials should be obliged to satisfy applicable due process requirements.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment of the Court of Appeals as to petitioner; if however, the Court affirms the Court of Appeals' judgment as to petitioner, it should also affirm its judgment as to the state prison officials.

Respectfully submitted,

LeROY S. ZIMMERMAN
Attorney General

AMY ZAPP
Deputy Attorney General

JOHN G. KNORR, III
Senior Deputy Attorney General

ANDREW S. GORDON
Chief Deputy Attorney General
Chief, Litigation Section

Office of Attorney General
15th Floor, Strawberry Square
Harrisburg, PA 17120
(717) 783-1471

ADDENDUM

RELEVANT PROVISIONS OF
PENNSYLVANIA PRISON REGULATIONS

37 Pa. Code §§ 93.3, 93.11-93.14, 93.21-93.26, 93.71-93.74

(NOTE: The various provisions of the administrative regulations reproduced here were those in effect for all times relevant to this action. However, since that time, many have been amended or decodified and do not reflect present prison regulations.)

§ 93.3. Attorneys.

(a) Attorney visits to inmates shall be governed by the provisions of §§ 93.71-93.76 of this title (relating to visiting privileges) with the following exceptions:

(1) The confidentiality of the attorney-client relationship shall be honored; personnel shall not be stationed in such a manner as to be able to overhear normal conversation.

(2) Visits other than during normal visiting hours shall be arranged with the superintendent, or his designated representative.

(3) Attorneys other than those designated on the approved visiting list of the inmate shall be permitted to visit with inmates upon the request of the inmate if they are properly identified.

(b) For the purposes of this section, an attorney shall include all members of the Bar or of any of the courts of this Commonwealth. It shall also include attorneys admitted to practice under rule 12 1/2 of the Supreme Court of this Commonwealth and law students permitted to practice in accordance with rule 12 3/4 of the Supreme Court of this Commonwealth if there is compliance with the following provisions:

(1) Before being granted access to any inmate, such attorney or law student shall be required to prove his identity, and shall personally deliver to the superintendent or other designated officer, a letter from an attorney of this Commonwealth setting forth the following information:

(i) The name of the inmate to be interviewed or assisted.

(ii) The name of the attorney or law student and a statement by the attorney that such person has been certified in accordance with rule 12 1/2 or 12 3/4.

(iii) A statement by the attorney that the named person is acting under the general supervision of such attorney.

(iv) Such letter shall by [sic] made a part of the file of the inmate and subsequent access to the same inmate by the same person shall be permitted without requiring an additional letter.

(2) An attorney or law student permitted access to an inmate under paragraph (1) of this subsection shall be treated in all respects as an attorney during his visits to the institution.

(c) The Philadelphia Voluntary Defenders Association offers its legal services to inmates sentenced from Philadelphia County at all institutions except Pittsburgh. The institution shall cooperate with the following provisions:

(1) The institution shall provide a copy of the classification summary which they may take with them to be returned when they are finished.

(2) The institution shall refer any additional Philadelphia County cases to them.

(d) Inmates are not forbidden to assist others in preparing legal papers. In no case shall inmates be compensated in any manner by the inmates for whom assistance is rendered.

(e) An attorney may bring a tape recorder into the institution to interview his client if he has a court order restricting its use to the preparation of his case and not for other publication or broadcast.

TELEPHONE CALLS

§ 93.11. Purpose.

(a) The policy of the Bureau is to maximize availability of meaningful contact with family, relatives, friends, and others concerned with the overall treatment program of the individual inmate. This is essential to the rehabilitation and reintegration process in terms of morale, maintenance of family life and community ties. Therefore, §§ 93.11-93.14 of this Title (relating to telephone calls) sets forth standardized rules governing telephone calls by inmates.

(b) These provisions constitute privileges for the residents of the Regional Correctional Facility at Greensburg and any subsequently established regional correctional facility.

§ 93.12. Policy.

Phone calls may be permitted. This shall be an individual decision made by the counselor on the basis of treatment rationale.

§ 93.13. Permissible telephone calls.

(a) Frequency. The frequency of telephone calls is an individual matter which shall be the decision of the counselor. On occasions when the number of calls may be excessive, such as major holidays, the number of calls per resident may need to be limited.

(b) Length of telephone calls. Telephone calls shall generally be limited to a duration of five minutes.

(c) Scheduling. Calls shall be scheduled through the counselor and placed during the counselor's working hours if possible. Otherwise, evening calls may be scheduled. A limit to the number of calls which can be handled with the equipment available should be established by the Director of Treatment. Generally, it is not necessary to schedule calls in advance of the day the call is desired, except weekends and holidays when the counselor will not be on duty.

(d) Place of telephone calls. During working hours, telephone calls shall be made from the office of the counselor. During nonworking hours calls shall be made from any convenient location as designated by the ranking officer. If possible, provisions for privacy shall be made.

(e) Records. The staff person completing the call may wish to record this on Form JBC-14, although this is not required. The decision to record calls should be based on treatment significance or cases which are making excessive use of the phone.

(f) Payment. Collect calls should be encouraged. Time and charges may be requested and a cash slip signed by the resident providing the existence of sufficient funds has been established prior to the call.

§ 93.14. Emergency telephone calls.

(a) If there is a serious illness, hospitalization, or death of a family member of an inmate, a telephone call shall be permitted immediately. Any resident, regardless of status, may make such a call.

(b) Any employe may be designated to supervise such a call. Authorization should come from the counselor or ranking officer. On such calls no time limit need be observed.

(c) A repeat attempt to reach a party shall be permitted for all calls. For regular calls, the inmate may try again later on the sequence of scheduled calls. Priority may be given to emergency calls.

(d) Phone calls by a resident to a resident who is a relative confined in another State Correctional Facility may be made upon the recommendation of both counselors and the approval of the RCF Director of Treatment and the Superintendent of the SCI or Director of Treatment of the other RCF. Such calls must be scheduled five days in advance, and the call must be completed during the regular working day.

MAIL PRIVILEGES

§ 93.21. Purpose.

The policy of the Bureau is to maximize communication between the inmate and the family, relatives, friends, news media, and others concerned with the overall program of the individual inmate. This is essential to the rehabilitation process in terms of morale, maintenance of family ties, and reintegration into the community.

§ 93.22. Free and allowable letters.

(a) Postage-free correspondence. Each inmate shall be permitted, without cost, to mail ten one-ounce first-class letters or the equivalent thereof in postage per month, up to $1.50. This amount is not transferable from month to month or from inmate to inmate.

(b) Postage-paid by the inmate correspondence. There shall be no limit on the number of postage-paid letters an inmate may send.

(c) Records. A record shall be kept in the mail room of the total number of letters mailed each month by the inmate, reflecting both postage-free letters and those for which the inmate has paid postage.

§ 93.22. Correspondents, restrictions, and procedure.

(a) All inmates shall be permitted to correspond with friends, family members, attorneys, news media; legitimate business contacts, and public officials. There shall be no limit to the number of correspondents.

(b) The following restrictions will apply:

(1) Correspondence with inmates of other institutions, ex-inmates, probationers, or victims of the criminal acts of the inmate will not be permitted except upon special approval of the Superintendent.

(2) Correspondence containing threatening or obscene material, as well as correspondence containing criminal solicitations or furthering a criminal plan is prohibited.

(3) Inmates shall refrain from writing to persons who have stated in writing that they do not wish to receive mail from such inmates; provided, however, that this shall not be interpreted to restrict the right of inmates to correspond with public officials with respect to the official duties of the latter.

(c) Outgoing mail shall not be read, censored, or reproduced except as provided for in § 93.25 of this title (relating to security). It shall be checked as to addressee to determine if it is in accordance with the provisions of subsection (b) of this section.

(d) Incoming mail shall not be read, censored, or reproduced except as provided for in § 93.25 of this title (relating to security). It shall be opened and examined for contraband. Money orders, certified checks, or cash shall be recorded indicating the nature of receipt, the sender, the amount received, and the date. Personal checks, unless certified, shall be returned to sender. The institution shall not be responsible for cash sent through the mails and the sender, if known, shall be notified accordingly. The inmate shall be notified of all

monies received. Letters containing contraband shall be held for further inspection and disposition by the Deputy Superintendent for Treatment Services and Operations.

(e) Inmates shall seal and place all correspondence in the mailroom boxes provided in each housing unit.

(f) All outgoing mail shall include, on the envelope, the inmate's full committed name and institutional number, printed legibly. Envelopes not bearing this information shall be opened and returned to the sender.

(g) When a check from the inmate's account is to be placed in outgoing mail, the inmate shall fill out a Form JBC-138A, and his signature shall be witnessed by a staff member. This shall then be attached to an unsealed envelope and placed in the mail box provided and processed through inmate accounting in accordance with internal institution procedures.

§ 93.24. Privileged correspondence.

(a) Inmates shall be permitted to send sealed letters to the following persons:

(1) Elected Federal, State, or local officials.

(2) Appointed Federal or State officials.

(3) Lawyers.

(b) Mail to these persons shall not be opened, read, censored, or reproduced except as provided in § 93.25 of this title (relating to security). Mail from these persons shall be delivered to the housing unit officer, opened by the officer in the presence of the addressee and checked for contraband as a precaution in case the mail is not from whom it is purported to be. Mail from these persons shall not be read, censored, or reproduced except as provided for in § 93.25 of this title (relating to security).

§ 93.25. Security.

(a) The institution shall retain the right to read nonprivileged mail upon the approval of the Superintendent only when there is reason to believe that security may be impaired or that this directive is being abused.

(b) The institution shall retain the right to read privileged mail, as set forth in § 93.24 of this title (relating to privileged correspondence), only upon the written order of the Superintendent with the written approval of the Commissioner of Correction and of the Attorney General when there is reason to believe that there is a threat to security or that there is criminal activity.

(c) A log shall be kept of instances where mail is read and the inmate shall be notified immediately, unless such notification would impede investigation of criminal activity, in which case he or she shall be notified at the completion of the investigation.

(d) Mail may be reproduced upon written order of the Superintendent with the written approval of the Commissioner of Correction and of the Attorney General, only in those cases where it is determined that there is good reason to believe that the correspondence is evidence of criminal activity.

(e) An item of correspondence which is reviewed in compliance with subsections (a) and (b) of this section, which appears violates § 95.23(b) of this title (relating to correspondence, censorship, and contents) shall be reviewed by the Deputy Superintendent for Operations who shall notify the inmate and the sender in cases where the inmate is not the sender when the letter is rejected. The letter shall be held for at least 48 hours, excluding weekends and holidays, after the receipt of such notification by the sender to permit reasonable opportunity to protest the decision. The Superintendent shall review all complaints received and the letter and make a final decision of whether the letter shall be rejected. If the letter is rejected it shall be returned to the sender by the Superintendent.

(f) An inmate who violates institutional mail regulations shall not lose his basic correspondence privilege. However, a serious violation may result in close scrutiny of an individual's mail until such time as it is determined that further violations will not occur.

§ 93.26. Handling and distribution of mail.

(a) Outgoing mail. Outgoing mail placed in housing unit mail boxes shall be collected each morning, Monday through Friday. Every effort shall be expended to assure that such mail is delivered to the United States Postal Service on the same day.

(b) Incoming mail. Incoming mail shall be processed as follows:

(1) Official mail and inmate mail shall be separated.

(2) Inmate mail shall be checked against the inmate master list.

(3) If an inmate has been transferred or released, mail shall be forwarded unopened to new address if known. If no forwarding address is available mail shall be returned unopened to the sender.

(4) Privileged correspondence shall be delivered unopened to the respective housing unit officer.

(5) All remaining mail shall then be opened, examined, and distributed to the inmate.

(6) All mail shall be delivered to the inmate as soon as possible after processing.

(7) It shall be the responsibility of the inmate who may receive letters of a disturbing nature to bring the matter to the attention of the housing unit officer and arrangements will be made for the inmate to discuss this with his caseworker.

(c) Certified or registered mail. Certified or registered mail shall be processed as follows:

(1) Each institution shall establish procedures in cooperation with the local United States Postmaster for the processing of certified or registered mail.

(2) Determination of mail to be sent by these methods shall be the responsibility of the inmate.

(3) The inmate must have funds available in his personal account and an approved cash slip for such postage payment.

VISITING PRIVILEGES

§ 93.71. Purpose.

The policy of the Bureau of Correction is to encourage opportunities for visits with family members, relatives, and friends. This is essential to morale, sustaining family life, and insuring ties in the community after release.

§ 93.72. Standardized rules governing visits.

(a) Approved list of visitors. A list of approved visitors shall be established during initial classification period and recorded on the Form JBC-311. The basic list may contain up to 20 names. Inmates who can show that they have more than 20 regular visitors may add additional names to their approved lists. Members of a family living at the same address shall be counted as one name. Except for members of an inmate's immediate family, a minor's name may be placed on the approved list only with permission of the minor's parents or guardian, on the Form JBC-313. Children under 12 years of age need not be placed on the official list. Changes or additions to the approved list may be made in accordance with established procedures on the Form JBC-312. The name of a visitor may be removed for good cause upon authorization by the Superintendent.

(b) Spiritual advisor and attorney. Designation by an inmate of an ordained spiritual advisor or an attorney, or both, may be made at any time. Such designation shall be in addition to the names on the approved list and shall not be counted against the total of 20.

(c) Ex-inmates. An ex-inmate who is a relative may visit with special permission of the Superintendent.

(d) Recording of visits. All visits shall be recorded on an inmate's visiting card, Form JBC-320.

(e) Registering of visitors. All visitors shall register in and out of the institution on the Form JBC-325.

(f) Visiting clothing. Separate facilities shall be provided at the male institutions whereby an inmate appearing for a visit can be searched, given a clean shirt and trousers, with reverse procedure followed upon completion of the visit. At the female institutions personal clothing may be worn with provision for searching the inmate following visit.

(g) Initial visits. The inmate's first visit after admission is important and, whenever possible, shall be scheduled following the medical quarantine period and shall be held in the presence of a staff caseworker.

(h) Disciplinary cases. Visits for inmates in disciplinary status shall be as follows:

(1) Administrative custody: Same as general population.

(2) Special adjustment unit: Visits shall be denied if the reason for disciplinary action is directly related to a violation of the visiting rules in which case visitors shall be informed by a counselor. In all other instances, a counselor shall first talk with the visitor, explain the reasons for the disciplinary measure, and advise on a constructive course of action. Depending upon the reaction of the visitor and the inmate to the situation and based upon the counselor's recommendation, the visit may or may not be held, subject to the final concurrence of the Superintendent or his designated representative.

(3) Capital cases: Prior to the Governor's Warrant being issued, visiting privileges shall be the same as for the general population. After the Governor's Warrant has been issued, visits are restricted by law to legal counsel, spiritual advisor, and members of immediate family, unless otherwise directed by Court Order.

(i) Visiting room officers. The public relations aspect of visiting contacts shall be given special attention. All visitors shall be

treated courteously and with understanding. It is important that officers present a good appearance, be pleasant, and be tactful. They shall be alert to any problems that may arise and be able to refer such problems to appropriate officials.

§ 93.73. Number, time, and place of visits.

Inmates shall be permitted to have visits as often as the situation at the institution will allow. Visits shall be of sufficient duration to be of value to both the inmate and visitor. Each inmate and visitor shall be provided a copy of internal visiting rules in accordance with the following:

(1) Visiting days. Visits shall be permitted every day of the year.

(2) Visiting hours. Morning and afternoon visiting hours shall be maintained. Evening visits may be maintained.

(3) Length of visits. Visits shall be of no less than one hour in duration. Longer periods may be allowed depending on inmate's program status and available space.

(4) Frequency of visits. One visit per inmate per week shall be permitted. Additional visits may be permitted unless the inmate's program status makes it impractical.

(5) Number of visitors at one time. The number of visitors an inmate may have at any one time shall be limited to five. A larger number may be permitted depending upon available space.

(6) Special visit. Provisions shall be made for the approval of a special visit at infrequent intervals of persons who may not be on approved list who have come a substantial distance and for a family visit to a seriously ill or injured inmate. Special visits shall be approved only by the Superintendent or Deputy Superintendent.

(7) Setting for visits. The setting for visits shall conform with the following provisions:

(i) Visits shall be held in a relaxed manner under official observation.

(ii) Visiting rooms shall be set with living room type furnishings.

(iii) An appropriate outdoor area furnished with picnic tables should also be provided.

(iv) The inmate and visitors may embrace when meeting and departing and may sit side-by-side. The inmate may hold small children on his lap.

(v) The inmate and visitors may eat or drink items sold at the institution.

(vi) Family-day visits are encouraged whereby the visitors will be permitted to bring a basket lunch and share it with the inmate.

§ 93.74. Security.

(a) If any visit is a threat to the security and order of the institution, such visits shall be disallowed.

(b) All outside visitors are subject to search before and after visiting.

(c) Any visitor who cannot produce identification or who falsifies identifying information shall not be allowed in the institution.

(d) A visit may be restricted or special security precautions imposed for violation of visiting rules or as warranted by the temperament of the inmate involved.

(e) Restriction of visiting privileges shall not be used as a disciplinary measure for an unrelated institutional rule infraction.

NO. 85-236

Supreme Court, U.S.
FILED
MAR 27 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

HARRY EICHENLAUB, Warden Clinton County Jail
Petitioner

v.

DAVID ALAN YURKY, MR. ZIMMERMAN, Warden SCI at Huntingdon, MR. WICKER, Deputy Superintendent SCI at Huntingdon,
Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

JOINT APPENDIX

JOHN C. YOUNGMAN, JR.
Counsel of Record
CANDOR, YOUNGMAN, GIBSON & GAULT
23 West Third Street
P.O. Box 1507
Williamsport, PA 17703
(717) 322-6144
Counsel for Petitioner

AMY ZAPP, Deputy Attorney General
Office of Attorney General
Criminal Justice Agencies
1512 Strawberry Sq.
Harristown Bldg. #1
Harrisburg, PA 17102
(717) 783-1471
Counsel for Mr. Wicker & Mr. Zimmerman

DAVID RUDOVSKY
Counsel of Record
10th Floor
121 North Broad Street
Philadelphia, PA 19107
(215) 568-3190
Counsel for David Alan Yurky

Petition for Certiorari filed August 8, 1985
Certiorari granted January 13, 1986

153 pp

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

TABLE OF CONTENTS

	Page
Docket Entries - United States Court of Appeals for the Third Circuit, Docket No. 84-5636.....	2
Complaint.....	22
Statement of Undisputed Material Facts Pursuant to L.R.M.D. Pa. 401.4.....	45
Response of Plaintiff Yurky to Defendant Eichenlaub's Statement of Undisputed Material.....	53
Affidavit of Harry W. Eichenlaub..	58
Defendant Harry Eichenlaub's Answers to Interrogatories of Plaintiff.....	60
Affidavit of David Yurky.....	83
Affidavit of David Yurky.....	87
Second Affidavit of David Yurky...	92

TABLE OF CONTENTS-Continued

	Page
Declaration of Charles H. Zimmerman.....	95
Declaration of Charles H. Zimmerman.....	99
Defendant Harry W. Eichenlaub's Response to Declaration of Defendant Charles H. Zimmerman..	102
Declaration of Emanuel C. Wicker..	103
Defendant Harry W. Eichenlaub's Response to Declaration of Defendant Emanuel C. Wicker.....	106
Response to Defendants Zimmerman and Wicker to Plaintiff's Statement of Undisputed Facts Material.....	107
Response to Statement of Undisputed Facts of Plaintiff Yurky.....	112

TABLE OF CONTENTS-Continued

	Page
Declaration of Curtis C. Carson...	115
Declaration of Glen R. Jeffes.....	122
Declaration of Benny E. Varner....	127
Declaration of Terry W. Henry.....	129
Letter of Ronald J. Marks dated August 10, 1981.....	134
Notice of Judgment.....	159

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Docket No. 84-5636

DAVID ALAN YURKY,
Appellant

v.

HARRY EICHENLAUB, Warden Clinton County Jail, MR. ZIMMERMAN, Warden SCI at Huntingdon, MR. WICKER, Deputy Superintendent SCI at Huntingdon,
Appellees

(D.C. Civil No. 82-0663)

RELEVANT DOCKET ENTRIES

DATE	NR.	FILINGS-PROCEEDINGS
1982		
May 26	1	COMPLAINT-
" "		NOTICE & CONSENT FORM-re Magistrate Referral mailed to Yurky from Scranton.
" "	2	AFFIDAVIT/DECLARATION-in support of request to proceed in forma pauperis. Copy of docket sheet to Judge Conaboy.
June 1	3	MEMORANDUM-of law dated 5/28/82
" "		ORDER-dated 5/28/82 that (1) Plaintiff's request to proceed IFP is granted. (2) Defendants Brown and Gilmore are dismissed from this action. (3) The Clerk of Court is directed to issue service of process upon all named Defendants, except Brown and Gilmore. (C) Copies to Petitioner and Defendants.

DATE	NR.	FILINGS-PROCEEDINGS
1982		
June 2	4	SUMMONS-issued along with copies of Complaint and Order and hand delivered to the U.S. Marshall in Scranton to be served on named Defendants, Eichenlaub, Zimmerman and Wicker.
June 11	5	PRAECIPE-for entry of appearance of Gregory R. Neuhauser, Deputy Attorney General for Defendants Zimmerman & Wicker.
June 22	6	ANSWER-of Defendants Zimmerman and Wicker, to Plaintiff's Complaint, and C. of S.
June 28	7	ANSWER-of Defendant, Harry Eichenlaub, Warden Clinton County Jail, and C. of S.
June 30	8	DEMAND FOR TRIAL-of Defendants by jury on all issues so triable of Right pursuant to Rule 38 of the Fed. Rules of Civil Procedure; C. of S.

DATE	NR.	FILINGS-PROCEEDINGS
1982		
June 30		SUMMONS-returned served on Harry Eichenlaub on 6/7/82, (MF&E$16.92); on Mr. Zimmerman on 6/8/82, (MF&E$3.00); on Mr. Wicker on 6/8/82, (MF&E$22.20); and on Attorney General on 6/10/82, (MF&E$3.00).
July 23	9	INTERROGATORIES-of Plaintiff to be answered by Defendant, Harry Eichenlaub.
" "	10	MOTION-of Plaintiff (unsigned) to receive copy of Federal Rules of Civil Procedure in forma pauperis.
Nov. 18	11	PETITION-of Gregory R. Neuhauser for leave to withdraw appearance.
" "		APPEARANCE-of Amy Zapp as counsel for Defendants, and C. of S.
Nov. 23		APPROVED-of withdraw, by the Court, copies to counsel from Scr.

DATE	NR.	FILINGS-PROCEEDINGS
1982		
Dec. 17	12	MOTION-of Defendants Zimmerman and Wicker, for enlargement of time in which to conduct discovery
" "		CERTIFICATE-of NonConcurrence, and C. of S.
" "	13	BRIEF-in support of Defendants', Zimmerman and Wicker, Motion for enlargement of time in which to conduct discovery, and C. of S.
Dec. 21		ORDER-that the time period in which discovery must be completed in case shall be extended by 3 additional months until March 23, 1982. (C)
1983		
Feb. 11	14	MOTION-of Plaintiff for an Order compelling discovery directed to Defendant Eichenlaub. Copy to Zapp and Youngman, Jr.
Mar. 9	15	MOTION-of Defendants to compel discovery

DATE	NR.	FILINGS-PROCEEDINGS
1983		
Mar. 9		CERTIFICATE-of NonConcurrence, and C. of S.
" "	16	BRIEF-of Defendants in support of Motion to compel discovery pursuant to Rule 37(a)(2) of the F.R.C.P., with exhibit attached and C. of S. (on Motion).
Mar. 15	17	PRACTICE-Order of Court calling the attention of the parties to the Local Rules of Court 401.5 through 401.8 and Fed. Rule of Civil Procedure 56. Copy to Plaintiff and Attorneys Zapp and Youngman, Jr.
Mar. 24	18	MEMO-of law
" "		ORDER-(1) Plaintiff's motion to compel discovery be and is granted; (2) the motion of Defendants, Zimmerman and Wicker, to compel discovery be and is granted; (3) this Order shall be complied with and all other discovery in

DATE	NR.	FILINGS-PROCEEDINGS
1983		
		this matter shall be completed on or before 4/8/83. (C) Copies to Plaintiff and counsel.
Apr. 6	19	ANSWERS-of Defendant, Harry Eichenlaub, to Interrogatories of Plaintiff; and C. of S. therein.
Apr. 8	20	REQUEST-of Plaintiff for Discovery of Documents directed to Defendant Eichenlaub, and C. of S.
" "	21	REQUEST-of Plaintiff for discovery of documents directed to Defendants, Zimmerman and Wicker, and C. of S.
" "	22	INTERROGATORIES-propounded by Plaintiff to be answered by Defendants, Zimmerman and Wicker, and C. of S.
Apr. 20	23	MOTION-of Defendants, Zimmerman and Wicker, for a Protective Order pursuant and to Rule 26(c) of the Fed. Rules of Civil Procedure.

DATE	NR.	FILINGS-PROCEEDINGS
1983		
Apr. 20		CERTIFICATE-of NonConcurrence; C. of S.
" "	24	BRIEF-in support of the Motion by Defendants, Zimmerman and Wicker, for a Protective Order pursuant to Rule 26(c) of the Fed. Rules of Civil Procedure; C. of S. in Doc #23.
Apr. 21	25	MOTION-of Plaintiff to Amend Complaint to include additional Defendants.
" "		BRIEF-in support of Motion to Amend Complaint, and C. of S.
May 2	26	BRIEF-of Plaintiff in opposition to Defendants' Motion for a Protective Order w/attachment and C. of S.
May 4	27	ORDER-A pretrial conference in action has been scheduled for Friday, May 20, 1983 at 2:30 P.M. in Chambers, U.S. Courthouse, Scranton, Pa. The Superintendent of the

DATE	NR.	FILINGS-PROCEEDINGS
1983		
		State Correctional Institution at Huntingdon, Pa. is hereby directed to produce the Plaintiff, David Alan Yurky, for this conference, to keep the prisoner safe in custody and, at the conclusions of the conference to return the prisoner to his place of confinement prior to the conference. (C) Copies to Plaintiff, Attorney General, Attorney Youngman and Superintendent at Huntingdon. - Courtesy copy to U.S. Marshall
May 3	28	BRIEF-of Defendant Eichenlaub, in opposition to the Motion to Amend Complaint to join Additional Defendants, and C. of S.
" "	29	MOTION-of Defendant Eichenlaub, for Protective Order prohibiting further production of documents in this matter, and C. of S.

DATE	NR.	FILINGS-PROCEEDINGS
1983		
May 3	30	BRIEF-of Defendant Eichenlaub, in support of Motion for Protective Order, and C. of S.
May 5	31	C OF N-of John C. Youngman, Jr., Attorney for Defendant, Harry Eichenlaub, hereby certify that concurrence in the instant motion was not sought or obtained from Plaintiff because he is a resident of a correctional institution who is proceeding Pro Se.
May 4	32	NOTICE-that pretrial conference is set for May 20, 1983 at 2:30 P.M. in Chambers in Scr., Pa. Because the matter involves pro se incarcerated litigants, the Court does not feel it practicable to require full compliance with the directions in the Local Rules of Court regarding the submission of pretrial Memorandum. The Court will, however, require the parties to submit, no less

DATE	NR.	FILINGS-PROCEEDINGS
1983		
		than 2 days prior to the conference, a short and plain statement of the facts and a brief description of the damages claims. Counsel's attention is specifically directed to Local Rule of Court 408.2 (C) Copy to Plaintiff, DAG Zapp and Attorney Youngman.
May 6	33	BRIEF-of Defendants in opposition to Defendants' motion to amend the Complaint, and C. of S.
May 16	34	BRIEF-of Plaintiff in opposition to Defendants' motion for protective order and C. of S.
May 17	35	STATEMENT-of Facts by Defendants, Zimmerman and Wicker, C. of S.
May 18	36	STATEMENT-of Facts filed by Plaintiff. Copy to Zapp and Youngman, Jr.
May 23	37	P/T MEMO-of Defendant Eichenlaub, and C. of S.

DATE	NR.	FILINGS-PROCEEDINGS
1983		
May 24	38	NOTICE-to counsel from C's setting pretrial/settlement conference for 7/11/83 in Scr. chambers at 11:30 A.M. CC to Yurky and counsel from CO.
June 27	39	ORDER-of Court, pretrial conference scheduled for Monday, 7/11/83 at 11:30 A.M. in Chambers at Scr., Pa. Superintendent of SCI at Huntingdon is hereby directed to produce Plaintiff, David Alan Yurky, for this conference. (C) Copy to Yurky, DAG Zapp, Attorney Youngman, Superintendent at Huntingdon from Scr.
July 11	40	MIN SHT-of pretrial conference in Scr. on 7/11/83.
July 12	41	ORDER-(1) Defendant Eichenlaub's motion for a protective order be and is denied. (2) The motion of Defendants, Zimmerman and Wicker, for a protective order be and is denied.

DATE	NR.	FILINGS-PROCEEDINGS
1983		
		(3) Defendants be and are granted an extension of time until August 1, 1983 to answer Plaintiff's interrogatories and requests for production of documents. (4) Plaintiff shall respond, if he so chooses, to Defendants' answers within ten days of his receipt of them. Copies to Yurky, Zapp and Youngman, from Scr. (C).
July 27	42	RESPONSE-of Defendants, Zimmerman and Wicker, to Plaintiff's Request for Production of Documents, and C. of S.
Aug. 1	43	ANSWERS-of Defendants, Zimmerman and Wicker, to Plaintiff's first set of interrogatories and C. of S.
1984		
April 2	44	MOTION-of Plaintiff for partial summary judgment

DATE	NR.	FILINGS-PROCEEDINGS
1984		
April 2		MEMO-of Plaintiff in support of motion for partial summary judgment, and C. of S.
April 11	45	MOTION-of Plaintiff for sanctions against Defendant Eichenlaub, for his failure to comply with discovery previously ordered by the Court.
" "		BRIEF-of Plaintiff in support of Plaintiff's motion for sanctions against Defendant Eichenlaub, for his failure to comply with discovery previously ordered by the Court, and C. of S.
April 20	46	RESPONSE-of Defendant, Harry W. Eichenlaub, to request for production; C of S.
" "	47	BRIEF-in opposition to Plaintiff's Motion for sanctions and C. of S. therein.

DATE	NR.	FILINGS-PROCEEDINGS
1984		
April 17	48	MOTION-of Defendants, Zimmerman and Wicker, for an enlargement of time in which to file declaration in support of Defendant's cross-motion for summary judgment.
" "		DECLARATION-of Defendant, Charles H. Zimmerman; cert of nonconcurrence. C. of S.
April 16	49	CROSS-MOTION-of Defendants, Zimmerman and Wicker, for summary judgment pursuant to FRCP 56; cert of nonconcurrence; C. of S.
" "	50	BRIEF-of Defendants, Zimmerman and Wicker, in opposition to Plaintiff's motion for partial summary judgment and in support of cross-motion of Defendants for summary Judgment. C. of S. per motion.
April 30	51	BRIEF-of Plaintiff in opposition to cross-motion of Defendants, Zimmerman and Wicker, for summary judgment.

DATE	NR.	FILINGS-PROCEEDINGS
1984		
April 30		RESPONSE-to Commonwealth Defendant's Statement of Undisputed material.
" "		AFFIDAVIT-of David Yurky, C. of S.
May 10	52	MOTION-of Defendant Eichenlaub, for summary judgment; cert of nonconcurrence; cert of partial concurrence. C. of S.
" "	53	MOTION-of Defendant Eichenlaub, to be allowed to file brief in opposition to motion for summary judgment out of time; cert of concurrence; cert of nonconcurrence. C. of S.
" "	54	BRIEF-of Defendant Eichenlaub, in opposition to Plaintiff's motion for partial summary judgment and in support of Eichenlaub's motion for summary judgment. C. of S.
" "	55	STATEMENT-of Defendant Eichenlaub, of undisputed facts pursuant to L.R. M.C. Pa. 401.4 C. of S.

DATE	NR.	FILINGS-PROCEEDINGS
1984		
May 10	56	RESPONSES-of Defendant Eichenlaub, to affidavits of David Alan Yurky. C. of S.
" "	57	RESPONSE-of Defendant Eichenlaub, to declaration of Defendant, Wicker. C. of S.
" "	58	RESPONSE-of Defendant Eichenlaub, to declaration of Defendant Zimmerman. C. of S.
" "	59	RESPONSE-of Defendant Eichenlaub, to declaration of Terry W. Henry filed by Defendants, Wicker and Zimmerman. C. of S.
" "	60	RESPONSE-of Defendant Eichenlaub, to statement of undisputed facts of Plaintiff Yurky. C. of S.
" "	61	RESPONSE-of Defendant Eichenlaub, to statement of undisputed material of Defendants, Zimmerman and Wicker. C. of S.

DATE	NR.	FILINGS-PROCEEDINGS
1984		
May 10	62	RESPONSE-of Defendant Eichenlaub, to declaration of Benny E. Varner. C. of S.
" "	63	MOTION-of Commonwealth Defendants for an enlargement of time in which to submit reply brief; cert of concurrence and nonconcurrence. C. of S.
May 11	64	R/BRIEF-of Defendants, Zimmerman and Wicker, and C. of S.
May 14	65	CORRECTED REPLY BRIEF-of Defendants, Zimmerman and Wicker, correcting a few minor typographical errors and omissions; Letter of service stating copy to Plaintiff and county Defendant.
May 30	66	BRIEF-of Plaintiff in opposition to Defendant, Harry W. Eichenlaub's, motion for summary judgment.

DATE	NR.	FILINGS-PROCEEDINGS
1984		
May 30		RESPONSE-of Plaintiff Yurky to Defendant Eichenlaub's statement of undisputed material, and, second affidavit of David Yurky, and C. of S.
May 31	67	MOTION-of Commonwealth Defendants for leave to submit second reply brief. Cert. of concurrence and C. of S.
" "	68	BRIEF-of Commonwealth Defendants in support of motion for leave to submit second reply brief. C. of S.
" "	69	SECOND REPLY BRIEF- of Commonwealth Defendants. C. of S.
June 11	70	OPPOSITION-of Plaintiff to Commonwealth Defendants' 2nd reply brief filed out of time w/affidavit and C. of S. attached.
Sept. 7	71	MEMO/ORDER-in accordance with the accompanying Memorandum, it is ordered that (1) The Defendants'

DATE	NR.	FILINGS-PROCEEDINGS
1984		
		motion for summary judgment is granted. (2) Judgment in favor of the Defendants is hereby entered and the Clerk of Courts is directed to close this case. Copies to Yurky, Zapp and Youngman from Scr. Orig in vault. (C).
Sept. 19	72	NOT/APPEAL-filed by petitioner from the Order and Judgment granting Summary Judgment for the Defendants entered on September 7, 1984
" "		MOTION-therein to proceed on appeal in forma pauperis.
" "		AFFIDAVIT-of petitioner in support of Motion to proceed in forma pauperis. C. of S. Copy of Notice to Plaintiff, DAG Zapp, Attorney Youngman, Jr., with T/L to Court with Motion and Affidavit and T/L; to Court of Appeals with T/L, C/C of docket, C/C of Order of 9/7/84 and C/C of Order of 6/1/82.

DATE	NR.	FILINGS-PROCEEDINGS
1984		
Sept. 21	73	ORDER-(1)Petitioner Yurky is granted in forma pauperis statute for purpose of his appeal from adverse judgment of this Court (C) CC to Yurky and counsel from Clerk's office.
Sept. 26		DISTRICT COURT RECORD COMPLETE FOR PURPOSES OF APPEAL. RECORD ON APPEAL-mailed to Court of Appeals consisting of docs. 1-73 w/TL#2 and cert cc of docket.
Sept. 25	74	DOCKETING LETTER-of Ct. of Appeals docketing case to 84-5636. C. of S.
Oct. 1	75	RECEIPT-from Ct. of Appeals for record on appeal.

FORM TO BE USED BY PRISONERS IN FILING A COMPLAINT UNDER THE CIVIL RIGHTS ACT, U.S.C. §1983

[Filed May 20, 1982]

In the United States District Court
for the
Middle District of Pennsylvania

DAVID ALAN YURKY	:	
	:	
v.	:	NO.: 82-0663
	:	
HARRY EICHENLAUB, CARSON BROWN, DAVID GILMORE, et al.	:	

I. Previous Lawsuits

A. Have you begun other lawsuits in state or federal court dealing with the same facts involved in this action or otherwise relating to your imprisonment?

Yes_____ No__x__

B. If your answer to A is yes, describe each lawsuit in the space below. (If there is more than one lawsuit, describe the

additional lawsuits on another piece of paper, using the same outline).

1. Parties to this previous lawsuit

   Plaintiffs:_____

   Defendants:_____

2. Court (if federal court, name the district; if state court, name the county):

   _____

3. Docket Number:_____

4. Name of judge to whom case was assigned_____

5. Disposition (for example: Was the case dismissed? Was it appealed? Is it still pending?)_____

6. Approximate date of filing lawsuit:_____

7. Approximate date of disposition:_____

II. Place of Present Confinement: Huntingdon

A. Is there a prisoner grievance procedure in this institution?

Yes x No_____

B. Did you present the facts relating to your complaint in the state prisoner grievance procedure:
Yes_____ No__x__

C. If your answer is YES:

1. What steps did you take:

_____

2. What was the result?

_____

D. If your answer is NO, explain why not: At the Program Review Committee meeting, they denied my oral arguments and therefore became defendants.

III. Parties

(In Item A below, place your name in the first blank and place your present address in the second blank. Do the same for additional plaintiffs, if any).

A. Name of plaintiff:
David Alan Yurky

Address: Drawer R, Huntingdon, Pennsylvania, 16652

(In Item B below, place the full name of the defendant in the first blank, his official position in the second blank, and his place of employment in the third blank. Use item C for the names, positions, and places of employment of any additional defendants).

B. Defendant (1) Harry Eichenlaub is employed as Warden at Clinton County Jail - Lock Haven, Pa.

C. Additional Defendants (2) Carson Brown - Judge - Clinton County

(3) David Gillmore - Magistrage - Mill Hall, Pa.

(4) Mr. Zimmerman - Warden - SCIH

(5) Mr. Wicker - Dept. Supt. - SCIH

(6) Program Review Committee of Jan. 11th - SCIH

(7) Two unnamed Clinton County Jail guards - Lock Haven, Pa.

IV. Statement of Claim:

State here as briefly as possible the facts of your case. Describe how each defendant is involved. Include also the names of other persons involved, dates, and places. Do not give any legal arguments or cite any cases or statutes. If you intend to allege a number of related claims, number and set forth each claim in a separate paragraph. (Use as much space as you need. Attach extra sheet if necessary).

I was arrested December 23rd, 1981 in Mill Hall, Clinton County and charged with conspiracy and criminal complicity. I was arraigned before District Magistrate David Gillmore and bail was set at one hundred thousand dollars. Unable to post bail, I was taken to Clinton County jail. Due to a continuance granted the Commonwealth, I did not get a Preliminary Hearing until January 8th, 1982. From the day of my arrest until the day of my Preliminary Hearing, I was held in Clinton County jail in Lock Haven, Pa., and obeyed all officers and rules therein. (See additional pages)

V. RELIEF

State briefly exactly what you want the court to do for you.

1. Compensatory damages of twelve thousand dollars each against Eichenlaub, Brown and Gillmore.

2. Punitive damages against Eichenlaub, Brown and Gillmore appropriate to deter future violations of constitutional rights.

3. Compensatory damages of five thousand dollars each against Zimmerman, Wicker and the individual Jan. 11th PRC members

4. Compensatory damages of four hundred dollars each against two unnamed Clinton County jail guards.

5. Injunction against future transfer of pre-trial detainees to Huntingdon.

6. Court-appointed representation.

Signed this 6th day of May, 1982.

/s/ David Alan Yurky

Executed at SCI Huntingdon, Huntingdon

I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 6, 1982

/s/ David Alan Yurky

My preliminary hearing was held January 8th in Mill Hall, Pa. before Magistrate Gillmore and both the conspiracy and the complicity charge were bound over to Court. Immediately following the preliminary hearing, two State College, Pa. detectives came into the hearing room and arrested me, charging me with two robberies. I was taken into a back room where Magistrate Gillmore tentatively set my bail on those two robbery charges at two hundred thousand dollars. The two State College detectives then took me straight to Centre Hall, Pa. for arraignment before District Magistrate Keith Bierly, who continued bail at two hundred thousand dollars. I was then taken to the State College Municipal Building for fingerprinting. On the way to the State

College Municipal building I heard one of the State College detectives talk over the CB radio and the person he was talking to said he would meet them at the State College Municipal Bldg. with my personal belongings from my cell in the Clinton County jail. This was how I first learned that I was to be taken to the Huntingdon Penitentiary. After my fingerprinting at the State College Municipal Bldg., the two unnamed Clinton County jail guards appeared and took custody of me and said I was being taken to Huntingdon. They explained that the warden at Clinton County jail had decided to transfer me to Huntingdon Penitentiary because my bail was too high. I said I thought I had to have some kind of a hearing before I could be transferred; they said that was usually the case, but

that I wasn't getting any hearing that day. They said they had gotten my personal belongings from the Clinton County jail, which I later discovered to be untrue. Upon arrival at Huntingdon Penitentiary I was placed in Administrative Custody and given a yellow misconduct sheet which said "Security Risk See Attached Sheet", but there was no attached sheet.

Three days later on Jan. 11th I was seen by the Program Review Committee. I do not know who any of the members of that Committee were, but I believe the Institution keeps records of items like that. They said it was their understanding that they were holding me for the Federal authorities and that the Federal authorities would be there either that night (Monday) or the next (Tues.

12th). I do not know what their source of information was on that. They said I would be placed in Administrative Custody until then but that in the event that the Federal authorities didn't show that I then would be re-evaluated by the Program Review Committee. I received no copy of the proceedings. I was held in Administrative Custody-Maximum until Feb. 10th. During my time in Administrative Custody I made repeated requests for additional phone calls for legitimate legal purposes, but was consistently denied. I was unable to contact alibi or material witnesses for either of my two subsequent preliminary hearings; character witnesses for my bail reduction hearing; or either of my two different attorneys in order to provide input for the bill of particulars, discovery

motions, or any defense as to witnesses against me during this critical pre-trial period. I eventually petitioned the Deputy Supt. of Operations Wicker, citing many of the same reasons mentioned above, and was granted one additional completed call. I also wrote to Deputy Wicker, stating that I believed that no Federal authorities were coming for me as per the Jan. 11th PRC meeting believed and that unless Huntingdon had information to the contrary, I asked for release to a less restricted housing unit where I would have access to telephone privileges. I received no response.

Transferring David Yurky from Clinton County jail to a maximum security prison was not justified by any fact. Warden Eichenlaub acted willfully and maliciously in transferring David Yurky

without notification, without a hearing, and without even his personal clothing. Eichenlaub's labeling of David Yurky as a security risk was not related to any behavior on Mr. Yurky's part, but based solely on the high amount of bail imposed by a local magistrate. High bail, absent any other evidence indicating Mr. Yurky to be a security risk, is not sufficient justification for the deprivation of Mr. Yurky's constitutional rights which took place. Mr. Yurky was charged with conspiracy; had not injured or threatened anyone; had not resisted arrest; and had no history of escape. During Mr. Yurky's seventeen days at the Clinton County jail, he went along with the program. Warden Eichenlaub's exaggerated response to a security consideration was overly reactive and violated Mr. Yurky's due

process rights. Warden Eichenlaub's actions destroyed the presumption of innocence implying that Mr. Yurky was so dangerous and so guilty that he must be confined in a maximum security prison or he would surely not appear at trial. There is nothing in Mr. Yurky's behavior during the seventeen days in Clinton County jail or in his past record to justify Warden Eichenlaub's actions. Warden Eichenlaub acted maliciously and without regard for any of Mr. Yurky's constitutionally protected rights (1. access to counsel; 2. freedom from deprivation of liberty without due process; 3. freedom from punishment without due process; 4. freedom from arbitrary action of government) when he willfully and with sneaky character transferred David Yurky with no notification, hearing or personal

clothing to a maximum security prison seventy-five miles away when a far more rational alternative of sending him to the Centre County jail less than thirty miles away existed.

Mr. Yurky suffered damages when he was subsequently forced to appear at a preliminary hearing in Centre County wearing prison-issued clothing from Clinton County jail. He also suffered damages to defense preparation by being separated seventy-five miles from the Clinton County Public Defender's Office. He also suffered mental and emotional duress due to his confinement and punishment, with all presumption of innocence destroyed, in a maximum security prison when Mr. Yurky knew he was not guilty of the crimes for which he was sent there.

As to Judge Carson Brown's involvement, he obviously was consulted and authorized the transfer. He knew David Yurky had not yet had a trial and was not a parole violator. He could reasonably have been expected to know that incarcerating me in a maximum security prison seventy-five miles away, rather than the county jail three blocks away, would restrict my access to the Public Defender's office and to his Court. Yet he consistently ordered and re-ordered me brought from, and returned to Huntingdon Penitentiary in violation of my due process rights. He had the authority and he had several opportunities to put an end to my illegal incarceration once the initial hysteria of the case died down, but chose not to act. He knew I was a pretrial detainee and never at any time did

he have any evidence in front of him to indicate that I would not be available for trial. Judge Brown's arbitrary "sentencing" me to Huntingdon without a trial constituted punishment without due process and deprivation of liberty without due process.

Magistrate David Gillmore violated David Yurky's rights by arbitrarily and maliciously setting ridiculously high bail. He first set bail at one hundred thousand dollars on a conspiracy charge; then later set an additional two hundred thousand dollars for two robbery charges. By denying me bail, he mandated that I not be released from custody. Mr. Yurky has no history of escape; no evidence was presented that he would not be available for trial; and Mr. Yurky neither injured anyone nor resisted arrest in any of the

alleged crimes. Magistrate Gillmore's action of effectively denying David Yurky bail constituted arbitrary action of government and denied Mr. Yurky due process and the opportunity to prepare a defense. His actions also destroyed the presumption of innocence in that by setting an incredible amount of bail, far exceeding almost anyone's capacity to raise, the implication was that David Yurky was definitely guilty and must not be permitted to return to society even for a moment.

Warden Zimmerman violated my rights when he (or his subordinates who in this case he must be held responsible for) accepted me as a security risk at a maximum security prison on a measly conspiracy charge. I was labeled a security risk without any evidence or

justification either then or since. Policy of accepting pre-trial detainee should have heeded to have been based on presentation of evidence that Mr. Yurky was in fact a security risk. No evidence was ever presented or in fact exists. Warden Zimmerman's taking of the enormous step of accepting into a maximum security prison a man who hadn't even had a trial yet, and subsequent placement of that man both in Administrative Segregation and then general population violated David Yurky's due process rights where no evidence existed or was present that he was in fact a security risk. Warden Zimmerman then further violated Mr. Yurky's rights by restricting his access to counsel and the Courts. Huntingdon Penitentiary is clearly not set up with the interests of pre-trial detainees in

mind. Phone call procedure in Administrative custody - one call every thirty days - is inadequate and denied my effective assistance of counsel during critical pre-trial stage. Also, calls were made only during evening hours 6 PM to 9 PM and most lawyers have no evening office hours. Phone procedures in general population were better, but still too inflexible. Procedure was done by cell rotation and one had no control over the day of the cell. Frequently there would be no calls during office hours left on the list by the time the guard came to your cell. If your rotation came up on an evening call and then on a weekend day, you could go all week without an opportunity to call your lawyer. Getting a special call at certain time of day was possible, but tough;

and it frequently would be necessary to compete with other inmates, many of whom did not like being competed with. My main complaint is the inflexibility, not at all suitable to the multi-variate needs of defense preparation.

The Program Review Committee of Jan. 11th, 1982 violated David Yurky's due process rights by placing him in Administrative Segregation without justification. Procedural safeguards were not followed as Mr. Yurky received no written notification of why he was being placed there and no evidence was presented justifying that placement. I have no idea who the members of that particular committee were, but their names can probably be truthfully determined from Institutional records. Their stated impression that I might be being held for

the Federal authorities could have been confirmed or refuted by phone within minutes, but was inexplicably never done. Classification of David Yurky as a security risk without evidence or justification and placement in Administrative Segregation denied Mr. Yurky his constitutionally protected rights to freedom from deprivation of liberty without due process, freedom from punishment without due process, and also denied him access to counsel and irreparaby damaged his ability to present a defense at his preliminary hearing in Centre County.

Deputy Wicker violated my rights when he ignored my request to be released from my illegal detention in Administrative Segregation. He was apprised by me of my situation, and he had the opportunity to check into the facts and remedy my ille-

gal situation. He instead chose to ignore my request and thus participated in the decision to deprive me of my liberty without due process to punish me without due process, and to impair my ability to communicate with counsel and prepare a defense.

The two unnamed Clinton County jail guards violated my rights when they chained and manacled me and took me to a maximum security prison when they knew I had not had a trial. They knew that minimal procedural safeguards had not been followed and acted maliciously in presenting me to the Huntingdon authorities as a "security risk" when their own observations of my behavior at Clinton County jail contradicted that assessment. They transferred me without allowing me to get my personal clothing which

necessitated my making two subsequent court appearances in Centre County dressed in "prison garb". The two unnamed Clinton County jail guards assisted Warden Eichenlaub in depriving me of my rights of access to counsel and to freedom from arbitrary punishment without due process. The names can probably be truthfully determined from work records at the Clinton County jail.

(Title Omitted in Printing)

STATEMENT OF UNDISPUTED MATERIAL FACTS PURSUANT TO L.R.M.D. PA. 401.4

Defendant Harry W. Eichenlaub by his attorneys, Candor, Youngman, Gibson & Gault, respectfully submit the following statement of material facts which are not in dispute:

1. For all times relevant to this action, David Alan Yurky, was an inmate confined to the State Correctional Institution at Huntingdon, Pennsylvania (SCI-Huntingdon) having been transferred to SCIH on an emergency basis from the Clinton County Jail (CCJ).

2. For all relevant times Yurky was a pretrial detainee and was classified as an HVA (Hold for Various Authorities).

3. For all relevant times, Defendant

Charles H. Zimmerman and Emmanuel C. Wicker, were employed by the Pennsylvania Bureau of Correction (BOC) as respectively, the Superintendent and Deputy Superintendent for Operations at SCI-Huntingdon.

4. Yurky arrived at SCI-Huntingdon at approximately 9:00 p.m., Friday, January 8, 1982.

5. At that time, he was given a copy of a BC-141D on which was indicated "security risk -- see attached".

6. The BC-141D also stated that he would be placed in Administrative Custody (Maximum) until such time as he could be seen by the SCI-Huntingdon's Program Review Committee (PRC).

7. At the time the BC-141D completed for Yurky on January 8, 1982, was prepared, the JBC-7X and JBC-185 forms which

accompanied Yurky to SCI-Huntingdon were attached to that form; copies of those attachments were not appended to Yurky's copy of the BC-141D or given to him in time, in accordance with the applicable standard institutional procedures.

8. That document also stated that the FBI would be arriving on January 11, 1982, to take Yurky for arraignment on bank robbery charges.

9. Pursuant to standard BOC policies concerning HVA in force at the time, Yurky was placed in Administrative Custody until he could be seen by the PRC.

10. The PRC at SCI-Huntingdon did not meet on weekends.

11. Yurky was seen by the PRC on Monday, January 11, 1982.

12. When seen by the PRC, Yurky was told that he was being transferred to SCI-Huntingdon as a security risk but was not informed of the underlying reasons for such transfer.

13. The JBC-7X which accompanied Yurky stated that he was a security risk and recommended a custodial classification of "maximum security."

14. In its personal interview with Yurky on that date, the PRC advised Yurky that it had information that the FBI would be arriving that day to take him for arraignment on bank robbery charges.

15. The PRC continued Yurky in Administrative Custody (Maximum).

16. Eichenlaub was informed by Deputy Commissioner DeRamus on January 8, 1982, that inasmuch as this was an emergency transfer, "a hearing will be held later."

17. Clinton County Jail was and is a minimum security institution, as is Centre County Jail.

18. On May 19, 1982, Plaintiff began trial on the robbery, conspiracy, and criminal complicity actions. On May 19, 1982, he was convicted of these crimes and is presently serving a sentence at SCI-H.

19. All of the allegations of Plaintiff's Complaint alleging deprivation of constitutional rights and right to any kind of liability are denied by Defendant Eichenlaub's Answer.

20. Eichenlaub received permission to transfer Plaintiff to SCI-H while Plaintiff was at a Preliminary Hearing at State College, Pennsylvania.

21. Eichenlaub harbors no ill will toward the Plaintiff, and at all times,

he has acted the good faith belief that his actions were lawful.

22. On December 23, 1981, Defendant Eichenlaub was informed by Pennsylvania State Police Troopers Robert Drumm and Steven Toboz that Plaintiff Yurky had a high bail bond, that Plaintiff Yurky was experienced in martial arts, and that Plaintiff Yurky had ties to the Palestine Liberation Organization.

23. On January 8, 1982, Defendant Eichenlaub was informed by Detective Musser of the State College Police Department that Plaintiff Yurky had an alleged passport to Lebanon, that there were new charges, that Plaintiff's bail would be set at an additional $200,000, and was informed by FBI agent Gwinn that Plaintiff would be charged with bank robbery.

24. On January 8, 1982, Defendant Eichenlaub sought oral approval from Deputy Commissioner DeRamus of the Pennsylvania Bureau of Corrections to transfer Plaintiff Yurky to a state correctional facility on the basis of an emergency situation. The evidence presented to Deputy Commissioner DeRamus by Defendant Eichenlaub to secure oral approval for an emergency transfer included: (A) Plaintiff Yurky's bail was raised to $300,000; (B) Plaintiff Yurky had alleged ties to the Palestine Liberation Organization; (C) Plaintiff Yurky had an alleged passport to Lebanon; (D) Plaintiff Yurky was allegedly experienced in martial arts; (E) Plaintiff Yurky would allegedly be charged in the future with bank robbery;

and (F) Clinton County Jail is an old facility.

25. Approval was granted to Defendant Eichenlaub to transfer Plaintiff Yurky to Huntingdon.

CANDOR, YOUNGMAN, GIBSON & GAULT

By /s/ John C. Youngman, Jr.
John C. Youngman, Jr.
I.D. No. 07582
Attorneys for Defendant
Harry W. Eichenlaub

(Title Omitted in Printing)

RESPONSE OF PLAINTIFF YURKY TO DEFENDANT EICHENLAUB'S STATEMENT OF UNDISPUTED MATERIAL

In accordance with the provisions of M.D. Pa. 401.4, Plaintiff Yurky, pro se, submits the following response to Defendant Eichenlaub's Statement of Undisputed Material.

1. Agreed

2. Agreed

3. Agreed

4. Agreed

5. Agreed

6. Disagreed. BC-141D did not state that Plaintiff would be placed in Administrative Custody (Maximum).

7. Agreed

8. Disagreed. Plaintiff did not become aware of any document stating that

the FBI would be arriving to take Plaintiff for arraignment on bank robbery charges until the discovery phase of this civil action.

9. Agreed

10. Agreed

11. Agreed

12. Disagreed that Plaintiff was told he was a security risk. Plaintiff was merely informed that he was being held for Federal authorities and that those authorities would be there that day or the next. Agreed that Plaintiff was not informed of any underlying reasons for the transfer.

13. Agreed that the JBC-7X stated that Plaintiff was a security risk; however, it is denied that the document recommends a custodial classification of "maximum security." The "maximum

security" merely reiterates Plaintiff's custodial classification at the county facility --- the recommendations section on the JBC-7X form is blank.

14. Agreed

15. Disagreed. The PRC removed Yurky from Administrative Custody (Investigative) and placed him in Administrative Custody (Maximum).

16. Plaintiff is without knowledge or information sufficient to admit or deny the statements contained in this paragraph.

17. Plaintiff is without knowledge or information sufficient to admit or deny the statements contained in this paragraph.

18. Disagreed. Plaintiff was never charged with robbery. On May 18th, 1982, Plaintiff began trial on conspiracy and

complicity actions. On May 19th, 1982, Plaintiff was convicted of conspiracy and criminal complicity and is presently serving a sentence at SCI-Huntingdon.

19. Agreed

20. Plaintiff is without knowledge or information sufficient to admit or deny the statements contained in this paragraph.

21. Disagreed.

22. Plaintiff is without knowledge or information sufficient to admit or deny the statements contained in this paragraph.

23. Plaintiff is without knowledge or information sufficient to admit or deny the statements contained in this paragraph.

24. Plaintiff is without knowledge or information sufficient to admit or deny

the statements contained in this paragraph.

25. Plaintiff is without knowledge or information sufficient to admit or deny the statements contained in this paragraph.

Respectfully submitted,

/s/ David Yurky
David Yurky, pro se

(Title Omitted in Printing)

AFFIDAVIT OF HARRY W. EICHENLAUB

Harry W. Eichenlaub, being duly sworn according to law, deposes and swears that the following facts are true and correct to the best of his knowledge, information and belief:

1. Eichenlaub was informed by Deputy Commissioner DeRamus on January 8, 1982, that inasmuch as this was an emergency transfer, "a hearing will be held later."

2. Clinton County Jail was and is a minimum security institution, as is Centre County Jail.

3. On May 19, 1982, Plaintiff began trial on the robbery, conspiracy, and criminal complicity actions. On May 19, 1982, he was convicted of these crimes

and is presently serving a sentence at SCI-H.

4. All of the allegations of Plaintiff's Complaint alleging deprivation of constitutional rights and right to any kind of liability are denied by Defendant Eichenlaub's Answer.

5. Eichenlaub received permission to transfer Plaintiff to SCI-H while Plaintiff was at a Preliminary Hearing at State College, Pennsylvania.

6. Eichenlaub harbors no ill will toward the Plaintiff, and at all times, he has acted the good faith belief that his actions were lawful.

/s/ Hary W. Eichenlaub
Harry W. Eichenlaub

Sworn to and subscribed before me
this 4th day of May, 1984.

/s/ Robin L. Cillo
Robin L. Cillo, Notary Public
Williamsport, Lycoming County, Pa.
My Commission Expires
October 12, 1987

(Title Omitted in Printing)

DEFENDANT HARRY EICHENLAUB'S ANSWERS TO INTERROGATORIES OF PLAINTIFF

Plaintiff pursuant to Rule 33 of the Federal Rules of Civil Procedure now serves this set of interrogatories upon Harry Eichenlaub, defendant in this action, for response within 45 days after this service.

Supply the specific source of information including name, date, capacity and identity of each source and/or party which defendant has referred to in assisting defendant with responses, and not merely that information which is based upon personal knowledge.

These interrogatories shall be responded to in full, each, every and all, and shall be responded hereto under

the penalties of 28 U.S.C. section 1746 and 18 U.S.C. section 1001.

It shall be the obligation of said Defendant, pursuant to rule 26(e)(1-3) of the Federal Rules of Civil Procedure to supplement his responses as to any and each and all interrogatories which can be supplemented with information which was not in Defendant's possession prior to the time of service of his responses and the time of trial hereto.

1. Who supplied you with the information that Plaintiff was a heroin addict?

ANSWER: Pennsylvania State Police Troopers Robert Drumm, Steven Toboz and Richard Rodgers.

2. Specify upon what evidence you based your contention that Plaintiff

allegedly had ties with the Palestine Liberation Organization?

ANSWER: I obtained this information both from Pennsylvania State Police Troopers Robert Drumm and Steven Toboz and from State College Policemen Detective Caster and Detective Musser.

3. Who, besides yourself, was involved in the decision-making process determining Plaintiff's status as a security risk; and at what point was that actual determination made?

ANSWER: Beside myself, Assistant Warden Robert A. Miller and Judge Carson Brown were involved in the decision-making process determining Plaintiff's status as a security risk. The determination was made on January 8, 1982, after having been informed on December 23, 1981, by Troopers Drumm and Toboz

that Plaintiff used martial arts, was connected with the Palestine Liberation Organization and had been held on high bail. On January 8, 1982, I was informed by Detective Musser of the State College Police Department that Plaintiff had an alleged passport to Lebanon and that there were new charges and bail would be set at $200,000.00 more. In addition, FBI agent Gwinn told me he was going to file bank robbery charges against Mr. Yurky on January 10, 1982.

4. Why did you not arrange for Plaintiff to be detained in some other county facility if you felt your own facility was inadequate?

ANSWER: I attempted to have Plaintiff placed in Rockville State Correction Institution, 36 miles away, but Deputy Commissioner DeRamus told me

that was not secure enough. He told me to take Mr. Yurky to Huntingdon State Correction Institution. In addition, I contacted Warden Bell in Bellefonte, Centre County. He wanted $50.00 per day for the incarceration of Plaintiff. Warden Bell also told me that he had three (3) inmates escape in September, 1981, and that his jail wasn't much more secure than mine.

5. What evidence was presented to Judge Carson Brown in his granting the Court Order confining Plaintiff at Huntingdon, and what other alternatives were discussed?

ANSWER: I informed Judge Carson Brown that new charges had been filed against Mr. Yurky, that bail totaled Three Hundred Thousand ($300,000.00) Dollars, that information from law enfor-

cement officers was obtained that Mr. Yurky had Palestine Liberation Organization ties and had an alleged passport to Lebanon, and that the FBI had informed me of the bank robbery charges to be brought. I felt that our jail was not secure enough, and Judge Brown agreed.

6. Were there ever any questions about the legality of sending Plaintiff to a maximum security prison without a trial?

ANSWER: Yes. Mr. DeRamus told me we could send Mr. Yurky on an emergency transfer. I felt if Mr. Yurky was held an additional 24 hours, I would be placing my staff and family in a dangerous position. Mr. DeRamus (Deputy Commissioner) agreed.

7. What evidence was presented to Deputy Commissioner Erskind DeRamus in obtaining his oral approval for Plaintiff's transfer?

ANSWER: (1) That Plaintiff's bail had been raised to Three Hundred Thousand ($300,000.00) Dollars.

(2) That mention had been made of a Palestine Liberation Organization connection of Plaintiff.

(3) That there was information that Plaintiff had a passport to Lebanon.

(4) That Plaintiff performed martial arts.

(5) That Plaintiff would be charged certainly with bank robbery.

(6) That our facility is old and our escape record was not good.

8. Did Deputy Commissioner DeRamus ever express to you any hesitation to send a pre-trial detainee to Huntingdon Penitentiary?

ANSWER: Yes. He said he would call back. In less than one-half hour he called me and told me to take Mr. Yurky to Huntingdon State Correctional facilities where they would be expecting us.

9. Once Plaintiff's bail was reduced, did you then ever consider returning his pre-trial detention to the Clinton County facility or any other county facility?

ANSWER: No. I was never notified of the bail reduction of Plaintiff. Further, bail was not the sole reason for the transfer of Plaintiff. Furthermore, I never received any information that any

of the allegations set forth in answer to Interrogatory 7 had been unfounded.

10. What evidence was presented by State College police, or any other police department, to justify denial of Plaintiff's visiting privileges on Sunday, January 3, 1982?

ANSWER: Plaintiff was not denied visiting privileges on January 3, 1982. Our records show that a visiting list at that time had not been verified. Mr. Yurky's family was accepted on the list. Two non-relatives were being checked out, but no word had been received as of January 3, 1982.

11. Were there any arrangements made with local or state police for any special security arrangements while Plaintiff was being detained at Clinton County jail?

ANSWER: Clinton County jail is a minimum security jail. Other than the security arrangements that we are able to use for every inmate, we used that procedure which was normally used at the jail. The obtaining of Mr. Yurky's transfer was made for the purpose of security.

12. Was any evidence ever presented you concerning Plaintiff's alleged knowledge of martial arts?

ANSWER: Yes.

13. To what people, conversations or documents are you referring when you stated you were "furthermore advised by the State Police officials of the dangerous propensities of the Plaintiff"?

ANSWER: (1) Conversation with State Police Troopers Drumm, Rogers and Toboz that there was a possible PLO connection

of Plaintiff and that Plaintiff had a passport to Lebanon.

(2) Conversation with the state police referred to above that Mr. Yurky was a heroin and drug user and that he hung around with many "dopers".

(3) Conversations with the above State Troopers Drumm and Toboz that Mr. Yurky was an expert in martial arts, and that I should advise my staff to be careful as he could "pick your eyes out in seconds and be gone".

14. Was the Lycoming County prison checked into on a continuing basis, allowing for the possibility that Plaintiff could at some subsequent time have been transferred to their county facility rather than his continued detention in a state penitentiary without trial?

ANSWER: Lycoming County prison is a minimum security prison, so that Plaintiff would not properly have been transferred to that prison.

15. What information did you receive from the FBI in addition to notification of possible Federal Bank Robbery charges, and what agent supplied it?

ANSWER: None other than that of Agent Gwinn of the State College office that it was alleged that Plaintiff had a Palestine Liberation Organization connection.

16. What inquiry was made into the source of information concerning Plaintiff's alleged Middle East connections and alleged dangerous propensities?

ANSWER: Investigations are handled by law enforcement officials, and I must rely on their information. This infor-

mation was received from the Pennsylvania State Police and State College Police as previously set forth in answer to previous Interrogatories incorporated herein by reference.

17. What tangible evidence in your possession indicated that Plaintiff would not be available for trial?

ANSWER: None other than the high amount of bail placed for Plaintiff's detention. It was obvious to me that the magistrate did not trust Plaintiff.

18. Who provided you with information supporting the contention that Plaintiff had no ties to Centre County?

ANSWER: No one other than Plaintiff who gave us the address of his family.

19. What is the precedent within Clinton County for sending a pre-trial

detainee, not on state parole, to a state maximum security penitentiary?

ANSWER: This is done only when a security risk is present. I believed Plaintiff to be a security risk and the Judge and Mr. DeRamus agreed.

20. Were you familiar, on January 8, 1982, with the circumstances surrounding Joe Dobbs' involvement with various police agencies and his role in the alleged attempted robbery December 23, and what information had you received?

ANSWER: No. No information was received.

21. Was publicity from newspaper and radio accounts of Plaintiff's alleged criminal behavior a factor in your decision to transfer him to Huntingdon?

ANSWER: No.

22. Specify that information provided you by State College police concerning Plaintiff's community background or other alleged involvement?

ANSWER: They told me that Plaintiff was being charged with armed robbery in their community, and that Plaintiff had PLO connections and a passport and that the FBI was going to charge Plaintiff with bank robbery. Also, they provided me with the information that Plaintiff was an expert in martial arts and was a drug and heroin user.

23. Did you at any time prior to Plaintiff's January 8 preliminary hearing attempt to interview him to make your own personal determination as to his character?

ANSWER: Yes.

24. Once Plaintiff's bail was

reduced and no Federal charges were lodged, did you then consider returning him to a county facility to await trial?

ANSWER: See answer to Interrogatory 9 incorporated herein by reference.

25. What factual information had you received from state police officials concerning Plaintiff's actual behavior the night of December 23?

ANSWER: None.

26. What was the evaluation of Plaintiff's behavior during the seventeen days (December 23 to January 8) he was detained in the Clinton County jail?

ANSWER: Plaintiff watched every move of the staff when unlocking the gates. He and co-defendant Seiler would get together at break and game time and look things over. I observed both checking the lock at the rear gate as if they were

planning something. Mr. Yurky would complain alot. The staff remarked to me that they feared an escape attempt by both Mr. Yurky and Mr. Seiler.

27. Was this evaluation (in Interrogatory No. 26) a factor in your decision to send Plaintiff to Huntingdon?

ANSWER: Yes.

28. Were there any discussions, subsequent to January 8, with Judge Carson Brown concerning a re-evaluation of Plaintiff's pre-trial detention?

ANSWER: No.

29. Was any kind of report filed with the Bureau of Corrections concerning an explanation for Plaintiff's pre-trial detention in a state penitentiary?

ANSWER: Yes.

30. Specify any information concerning Plaintiff conveyed from Clinton

County authorities to Huntingdon prison authorities either by document, phone or via unnamed Clinton County jail guards?

ANSWER: I sent the standard JBC-7X form. The Deputy Commissioner made arrangements for Mr. Yurky to be accepted at Huntingdon.

31. Was the Clinton County policy of accepting prisoners, and funding for those prisoners, from other overcrowded county facilities a factor in the decision to transfer Plaintiff to Huntingdon?

ANSWER: No.

32. What are the job qualifications for the position of warden of Clinton County jail?

ANSWER: A warden should have either a law enforcement background or experience in the criminal justice field. He should attend a management training

course. A warden must stand inspection yearly from the State Bureau of Corrections. A warden must administer the standards and goals set by the Bureau of Corrections.

33. What are your qualifications and training for that position?

ANSWER: I have had sixteen and one-half (16 ½) years experience in law enforcement, including that of going from patrolman to lieutenant in the Lock Haven Police Force between the years of 1964 and 1971. I was chief of police of the Jersey Shore Regional Police Department, a ten-man department, for six and one-half (6 ½) years. I was chief of police at Jersey Shore from 1971 to 1978. I was chief of police of Renovo Borough for two months prior to becoming warden of the

Clinton County prison, and I have been warden since October, 1979.

I attended a Polex course at Penn State. I attended the new warden's management school at Dallas in October of 1979. I have attended five (5) warden's seminars since October of 1979.

34. What sections of what documents were you acting under when you authorized Plaintiff's transfer to Huntingdon?

ANSWER: The Administrator's Manual Volume 7. OM-102.

35. Was the Constitutionality of Plaintiff's transfer to Huntingdon ever considered by you or anyone in your presence?

ANSWER: Yes.

36. Why was Plaintiff not given some type of hearing in order to hear, discuss and possibly refute some of the allega-

tions against him before being transferred to a state penitentiary?

ANSWER: Because at the time (a Friday) Plaintiff was being transferred to the magistrate's office in Centre County for the filing of new charges. I was also advised that the FBI was to file charges against Plaintiff for bank robbery the following Monday morning. No hearing was necessary on an emergency transfer.

37. Was detention of Plaintiff in Centre County jail in Bellefonte ever considered as a rational alternative to the state penitentiary?

ANSWER: Yes. Also see answer to Interrogatory No. 4 incorporated herein by reference. The Bellefonte jail was

not much more secure than the Clinton County jail.

CANDOR, YOUNGMAN, GIBSON & GAULT

By /s/ John C. Youngman, Jr.
John C. Youngman, Jr.
Attorneys for Defendant
Harry W. Eichenlaub

HARRY W. EICHENLAUB, being duly sworn according to law, deposes and swears that the facts set forth to the within Defendant Harry Eichenlaub's Answers to Interrogatories of Plaintiff are true and correct to the best of his knowledge, information and belief.

/s/ Harry W. Eichenlaub
Harry W. Eichenlaub

Sworn to and subscribed before me
this 4th day of April, 1983.

/s/ Richard K. Sweeley
Richard K. Sweeley, Notary Public
My Commission Expires
1st Monday January, 1984

(Title Omitted in Printing)

AFFIDAVIT OF DAVID YURKY

I, David Yurky, do hereby state under penalty of perjury that the following is true and correct based upon my personal knowledge:

1. I am the Plaintiff in this case and was a pretrial detainee at all times relevant to this civil action.

2. During late January, 1982, due to the necessity of locating material witnesses for an upcoming preliminary hearing, I appealed on multiple occasions to the various block officers in the R.H.U., predominantly to the block sergeants on morning and evening shifts.

3. Also during late January, 1982, due to the necessity of locating character witnesses for an upcoming bail-

reduction hearing, I appealed on multiple occasions to the various block officers in the R.H.U., predominantly to the block sergeants on morning and evening shifts.

4. On all such appeals for telephone calls, I was instructed to contact Deputy Superintendent of Operations E.C. Wicker, as I was told that all calls from the R.H.U. must be approved by the Deputy of Operations.

5. Therefore, I then used the BC-135A form entitled "Inmate's Request To Staff Member" to convey my legal situation to Deputy Supt. Wicker. I asked to be able to contact my two attorneys; I asked to be able to contact character witnesses for an upcoming bail-reduction hearing; I asked to be able to contact material witnesses for my upcoming preliminary hearing.

6. I received no response from Deputy Wicker to my request.

7. I again used the BC-135A form to convey to Deputy Wicker that during a trip to Court for a preliminary hearing which was postponed, I was informed by a State College detective named David Caster that it was his understanding that no Federal charges would be filed against me. I relayed this information via BC-135A to Deputy Wicker and explained that since the sole reason mentioned at my January 11, 1982 P.R.C. hearing was the possibility of Federal charges and that since it definitely appeared that no charges would be forthcoming, I asked for release to general population in order to engage in defense preparation.

8. I received no response from Deputy Wicker to my request.

9. At a subsequent Court appearance in Clinton County, my attorney Martha Riegel informed me that she had attempted to contact me by phone at SCIH on several occasions, but was told that SCIH policy did not permit her to contact me.

10. At a subsequent Court appearance in Centre County, my attorney Amos Goodall informed me that he had attempted to contact me by phone at SCIH on several occasions, but was told that SCIH policy did not permit him to contact me.

/s/ David Yurky
David Yurky, pro se

26 April, 1984

/s/ Richard I, Norris
Richard I. Norris, Notary
Smithfield Twp., Huntingdon County
My Commission Expires JUNE 4, 1984
Member, Pennsylvania Association of Notaries

(Title Omitted in Printing)

AFFIDAVIT OF DAVID A. YURKY

I, David A. Yurky, being duly sworn according to law, hereby state that the following facts are true and correct, based upon my own personal knowledge.

1) On December 23, 1981, I was arrested by members of the Pennsylvania State Police and charged with criminal conspiracy and criminal complicity.

2) After my arrest, I was committed to the custody of the Clinton County Jail as a pretrial detainee awaiting disposition of criminal charges.

3) On January 8, 1982 a preliminary hearing was held, at which time the District Justice found a prima facie case against me.

4) On January 8, 1982 I was

arrested by State College police officials and additionally charged with two counts of robbery, for which bail was raised an additional two hundred thousand ($200,000).

5) On January 8, 1982 I was transferred to the SCI at Huntingdon.

6) Prior to my transfer on January 8, 1982, I was not provided a notice, oral or written, by Harry Eichenlaub or anyone, apprising me that there was an impending transfer or the specific justifications underlying that transfer.

7) Prior to my transfer on January 8, 1982, I was not provided a hearing, of any type, by anyone, in order that I would have an opportunity to be heard in opposition to the transfer.

8) At no time prior to, or after my transfer to Huntingdon, did I ever

(5)

Supreme Court, U.S.
FILED
MAR 27 1986
JOSEPH F. SPANIOL, JR.
CLERK

NO. 85-236

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

HARRY EICHENLAUB, Warden Clinton County Jail
Petitioner

v.

DAVID ALAN YURKY, MR. ZIMMERMAN, Warden SCI at Huntingdon, MR. WICKER, Deputy Superintendent SCI at Huntingdon,
Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR PETITIONER

JOHN C. YOUNGMAN, JR.
Counsel of Record
CANDOR, YOUNGMAN, GIBSON & GAULT
23 West Third Street
P.O. Box 1507
Williamsport, PA 17703
(717) 322-6144
Counsel for Petitioner

DAVID RUDOVSKY
Counsel of Record
10th Floor
121 North Broad Street
Philadelphia, PA 19107
(215) 568-3190
Counsel for David Alan Yurky

AMY ZAPP, Deputy Attorney General
Office of Attorney General
Criminal Justice Agencies
1512 Strawberry Sq.
Harristown Bldg. #1
Harrisburg, PA 17102
(717) 783-1471
Counsel for Mr. Wicker & Mr. Zimmerman

Petition for Certiorari filed August 8, 1985
Certiorari granted January 13, 1986

JHP

QUESTION PRESENTED

Does due process require a hearing before an independent tribunal for a pretrial detainee transferred from a County prison to a State correctional institution on the basis of an emergency transfer as a security risk?

TABLE OF CONTENTS

	Page
OPINIONS BELOW	2
JURISDICTION	2
CONSTITUTIONAL PROVISION INVOLVED.....	3
STATEMENT OF THE CASE	
A. THE FACTS	3
B. THE DECISION OF THE DISTRICT COURT.....	8
C. THE DECISION OF THE COURT OF APPEALS.....	10
SUMMARY OF ARGUMENT	12
ARGUMENT	
I. No hearing before an independent tribunal must be accorded a pretrial detainee transferred as a security risk from a County prison to a State correctional institution in an emergency situation where the detainee had general notice of the reason for the transfer and had effective assistance of counsel	13

Page

II. Plaintiff suffered no loss of procedural due process, since he was afforded that due process to which he was entitled 16

A. The case of Cobb v. Aytch, 643 F2d 946 (C.A. 3, 1981) is distinguishable on its facts 16

B. Yurky was provided with procedural due process in the sense required by Hewitt v. Helms, 459 U.S. 460, 103 S. Ct. 864, 74 L. Ed. 2D 675 (1983) 21

CONCLUSION..... 27

TABLE OF AUTHORITIES

	Page
CASES	
Bell v. Woolfish, 441 U.S. 520, 60 L.Ed. 99 S. Ct. 1861, 60 L.Ed. 2d 447 (1979)	13
Cobb v. Aytch, 643 F.2d 946 (C.A. 3 1981)	9,11, 14,16, 18,20, 21,24, 26
Hewitt v. Helms, 459 U.S. 460, 103 S. Ct. 864, _____ L.Ed. 2d _____ (1983)	13,21, 22,23, 26
Jones v. Mabry, 723 F.2d 590 (C.A. 8 1983)	16
Kentucky v. Graham, 105 S. Ct. 3099 (1985).....	3
Montanye v. Haynes, 427 U.S. 236, 96 S. Ct. 2543, 49 L.Ed. 2d 446 (1976)	15
Olium v. Wakinekona, 103 S. Ct. 1741 (1983)	15,20

Page

STATUTES

28 U.S.C. 1254(1)..... 2

42 U.S.C. §1983..... 9

Pa. Code Sec. 95.103..... 23

Pa. Code Sec. 95.107..... 23

RULES

S. Ct. Rule 40.3..... 2

F.R.A.P. 43..... 3

NO. 85-236

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

HARRY EICHENLAUB, Warden Clinton County Jail
Petitioner

v.

DAVID ALAN YURKY, MR. ZIMMERMAN, Warden SCI at Huntingdon, MR. WICKER, Deputy Superintendent SCI at Huntingdon,
Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR PETITIONER

Petitioners, Harry Eichenlaub and his successors,[1] respectfully asks this Court to reverse the judgment of the

[1]Petitioner, Harry Eichenlaub, was killed in an automobile accident on July 13,

United States Court of Appeals for the Third Circuit with respect to its decision concerning Harry Eichenlaub.

OPINIONS BELOW

The Opinion of the Court of Appeals (P. App. A) is not reported. The Opinion of the District Court (P. App. B) is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on May 10, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). The Petition for Writ of Certiorari was granted on January 13, 1986.

1985. For purposes of the governmental liability, his successor, Arwyn Reish, is automatically substituted pursuant to S. Ct. Rule 40.3. All of the liability requested against Eichenlaub (J.A. 26, 27) is governmental in nature and not individual except the claim for punitive

CONSTITUTIONAL PROVISION INVOLVED

Amendment 14 §1. Citizens of the United States. All persons born or naturalizing.... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within his jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. THE FACTS

The uncontroverted material facts in this case are that from December

---

damages. Kentucky v. Graham, 105 S. Ct. 3099 (1985). Since Eichenlaub died prior to the time that the appeal was taken in this matter, a Motion is presently being sent to the United States Court of Appeals under F.R.A.P. 43 to substitute the Executor of the Estate of Harry W. Eichenlaub for purposes of any personal liability in this matter.

23, 1981, until January 8, 1982 (J.A. 87), Plaintiff was a pretrial detainee at the Clinton County Jail (CCJ). On January 8, 1982, Plaintiff was transferred to the State Correctional Institution at Huntingdon (SCIH) without being given a hearing wherein he might voice his opposition to said transfer (J.A. 88). On his arrival at SCIH, Plaintiff was assigned to Administrative Custody (AC) until such time as he could be taken in front of the Program Review Committee (PRC) (J.A. 89). This was accomplished on January 11, 1982 (J.A. 89). The PRC's determination at that time was that, pending a chance to gather more information about the Plaintiff, he should remain in AC (J.A. 90). Plaintiff did, in fact, remain in that mode of custody until February 9, 1982 (J.A.

120). During the time he was in AC, Plaintiff Yurky had all the access to his attorneys permitted by Bureau of Corrections (BOC) regulations (P. App. 17a, 18a). Over three months elapsed from the time Plaintiff was released from General Population (GP) to the time (May 19, 1982) that his trial began (P. App. 5b). During all relevant times Defendant Eichenlaub was the Warden of CCJ, Defendant Wicker was Deputy Superintendent at SCIH and Defendant Zimmerman was Warden of SCIH (P. App. 5a).

In addition, the Affidavit of Harry W. Eichenlaub filed with his Brief in the Court below as Exhibit "1" avers the following additional facts:

1. Eichenlaub was informed by Deputy Commissioner DeRamus on January 8,

1982, that inasmuch as this was an emergency transfer, "we'll (prison officials) have a hearing later" (J.A. 48).

2. Clinton County Jail was and is a minimum security institution, as is Centre County Jail (J.A. 41).

3. On May 19, 1982, Plaintiff began trial on the robbery, conspiracy, and criminal complicity actions. On May 19, 1982, he was convicted of these crimes and is presently serving a sentence at SCIH (J.A. 49).[2]

4. All of the allegations of Plaintiff's Complaint alleging deprivation of constitutional rights and right to any kind of liability are denied by Defendant Eichenlaub's Answer (J.A. 49).

---

[2]Plaintiff Yurky was charged with two counts of bank robbery on January 8,

5. Eichenlaub received permission to transfer Plaintiff to SCIH while Plaintiff was at a Preliminary Hearing at State College, Pennsylvania (J.A. 49).

6. Eichenlaub harbors no ill will toward the Plaintiff, and at all times, he has acted the good faith belief that his actions were lawful (J.A. 49, 50).

Appellant Yurky was aware of his bail being raised to $300,000.00 and was aware of the condition existing at Clinton County Jail (J.A. 50, 51, 66).

1982. He was tried on these counts in Bellefonte on June 29, 1982. He was convicted and is presently serving a sentence of ten years minimum with respect to this conviction. This information was obtained in a phone conversation with Yurky's attorney who represented him in the bank robbery matter, Amos Goodall of Bellefonte, Pennsylvania.

Interrogatory No. 7 of Plaintiff to Defendant Harry Eichenlaub states the following:

> "7. What evidence was presented to Deputy Commissioner Erskind DeRamus in obtaining his oral approval for Plaintiff's transfer?"

ANSWER:

> "(1) That Plaintiff's bail had been raised to $300,000.00.
>
> (2) That mention had been made of a Palestine Liberation Organization connection of Plaintiff.
>
> (3) That there was information that Plaintiff had a passport to Lebanon.
>
> (4) That Plaintiff performed martial arts.
>
> (5) That Plaintiff would be charged certainly with bank robbery.
>
> (6) That our facility is old and our escape record was not good. (J.A. 66)."

B. THE DECISION OF THE DISTRICT COURT

After discovery, the parties filed Cross-Motions for Summary Judgment pur-

suant to a pro se civil rights action based upon 42 U.S.C. §1983. District Judge Richard Conaboy granted summary judgment for Defendant Harry Eichenlaub on the basis that a prima facia case had been found to exist against Plaintiff Yurky, at his preliminary hearing, and a factors approach had dictated that high bail, which Yurky failed to raise, be set (P. App. 9b). The District Court found that the Prison Review Committee Panel's Act of informing Yurky that he was considered a security risk was the sort of general notice mandated by the case of Cobb v. Aytch, 643 F.2d 946 (C.A. 3, 1981) and that there was nothing in the case to indicate that Defendants had deprived Yurky of any federally protected right (P. App. 11b), including effective assistance of counsel (P. App.

18b, 19b), and held that he was permitted to make phone calls during his detention and that he received legal mail on five occasions (P. App. 18b). In addition, there was no evidence that Yurky ever missed a pretrial hearing or was forced to seek a continuance of his case (P. App. 19b). Moreover, both of Yurky's lawyers work within an hour's drive of his place of confinement and had liberal visitation privileges (P. App. 19b). No argument was made by Yurky before the District Court that he was denied a speedy trial. Plaintiff Yurky did not raise or argue a lack of speedy trial claim before the District Court.

C. THE DECISION OF THE COURT OF APPEALS

Plaintiff Yurky appealed the District Court's ruling to the U.S. Court of Appeals for the Third Circuit. On May

10, 1985, the Circuit Court panel reversed the District Court holding with respect to Defendant Eichenlaub on the basis that the case of Cobb v. Aytch, 643 F.2d 946 (C.A. 3, 1981) mandated a hearing before an independent tribunal to be accomplished by Defendant Eichenlaub after the transfer of Yurky from the Clinton County Jail to the State Correctional Institution at Huntingdon (P. App. 8a-12a). The Court affirmed the summary judgment of the District Court that Plaintiff Yurky was not denied effective assistance of counsel (P. App. 17a, 18a). The Court used the same factual basis for granting the summary judgment as the District Court and in addition, stated that there was no evidence that any emergency arose during his time in prison, and that Plaintiff's

attorneys were free to visit him in prison (P. App. 18a). Respondent Yurky did not appeal the grant of summary judgment with respect to the effective assistance of counsel claim. Appellant Yurky did not argue or raise a claim that he was denied a speedy trial before the Court of Appeals.

SUMMARY OF ARGUMENT

No hearing before an independent tribunal must be accorded a pretrial detainee transferred as a security risk from a County prison to a State correctional institution in an emergency situation where the detainee had general notice of the reason for the transfer and had effective assistance of counsel. Plaintiff Yurky's failure to appeal the Court of Appeals' grant of summary judgment in favor of Defendants on

Plaintiff's lack of effective assistance of counsel claim removes all basis for application of the Fourteenth Amendment to this case.

ARGUMENT

I. NO HEARING BEFORE AN INDEPENDENT TRIBUNAL MUST BE ACCORDED A PRETRIAL DETAINEE TRANSFERRED AS A SECURITY RISK FROM A COUNTY PRISON TO A STATE CORRECTIONAL INSTITUTION IN AN EMERGENCY SITUATION WHERE THE DETAINEE HAD GENERAL NOTICE OF THE REASON FOR THE TRANSFER AND HAD EFFECTIVE ASSISTANCE OF COUNSEL.

This Court has delineated the type of process due a pretrial detainee in Bell v. Woolfish, 441 U.S. 520, 60 L.Ed. 99 S. Ct. 1861, 60 L.Ed. 2d 447 (1979). In addition, this Court has delineated the kind of process due persons in prison in Hewitt v. Helms, 459

U.S. 460, 103 S. Ct. 864, _____L.Ed. 2d_____ (1983). The District Court held that the due process given Respondent in this case was adequate (P. App. 9b). The Court stated:

> "Plaintiff Yurky was already validly incarcerated. A prima facia case had been found to exist against him and a factors approach had dictated that high bail, which Yurky failed to raise, be set."

The prison panel gave Yurky general notice of the reason for the transfer, that is, he was a security risk. Harry Eichenlaub did obtain the Court of Common Pleas' approval for the transfer and the record demonstrates that there was a rational basis for the transfer (J.A. 66).

The Circuit Court of Appeals held that the case of Cobb v. Aytch, 643 F.2d 946 (C.A. 3, 1981) controlled the case at

bar and that a hearing before an independent tribunal was required (P. App. pgs. 8a-12a).

A transfer of a prisoner from one prison to another does not infringe a protected liberty interest, Montanye v. Haynes, 427 U.S. 236, 96 S. Ct. 2543, 49 L.Ed. 2d 466 (1976). This has also been reitterated in the case of Olium v. Wakinekona, 103 S. Ct. 1741 (1983). The Court of Appeals held that Petitioner was not denied the effective assistance of counsel, and has held with respect to Petitioner that the only thing suffered by Respondent was the lack of a hearing before an independent tribunal. As was stated by this Court in Olium, supra, at 103 S. Ct. at 17-8, "process is not an end in itself. Its constitutional purpose is to protect a substance of

interest to which the individual has a legitimate claim of entitlement." Here, there is no such interest to protect. See also Jones v. Mabry, 723 F.2d 590 (C.A. 8, 1983).

II. PLAINTIFF SUFFERED NO LOSS OF PROCEDURAL DUE PROCESS, SINCE HE WAS AFFORDED THAT DUE PROCESS TO WHICH HE WAS ENTITLED.

A. THE CASE OF COBB V. AYTCH, 643 F.2d 946 (C.A. 3, 1981) IS DISTINGUISHABLE ON ITS FACTS.

In Cobb, the Third Circuit considered, inter alia, whether the transfer of pretrial detainees being held in Philadelphia-area correctional facilities to State institutions implicated a protectible liberty interest which would entitle the detainees to due process in connection with such transfer. That

Court concluded, based on the facts of that case, Id. at 960, that a federal liberty interest was involved in such transfers, and the detainees so affected were entitled to a pre-transfer hearing.

The undisputed facts of record established the following: detainees were transferred sizeable distances (at minimum 90 miles, at maximum 300 miles). Id. at 949. As a result, many transferred detainees were deprived of the assistance of their court-appointed counsel and in some cases missed court appearances and hearings when they were not returned to Philadelphia on time. Id. at 951. Due to ensuing continuances, the pretrial period of some inmates was prolonged, as was the eventual length of their sentences. Id. Additionally, visits to detainees by family and friends

were reduced, presumably due to the increased distance. Id. at 952. In some cases, restrictions were imposed on detainees' mail privileges in State institutes. Id.

As previously mentioned, the Court in Cobb determined that the specific facts of record implicated the detainees' Sixth Amendment rights to speedy trial and effective assistance of counsel and concluded that a protectible liberty interest was present under such circumstances. A similar conclusion on the facts of this case is not justified.

Yurky's transfer from CCJ to SCIH involved a difference in distance of approximately 60 miles.[3] At SCIH, Yurky

---

[3]The change in Yurky's confinement did not result in sizeable increases in the distance between him and his attorneys. Yurky's attorneys were located in Lock Haven and Bellefonte. See Yurky's

had adequate means for effectively communicating with his counsel and any other parties with whom he may have chosen to correspond. Likewise, there is nothing of record which indicates that Yurky ever failed to appear in a Court proceeding or that the duration of his pretrial confinement was increased as a result.

In addition, the failure to argue denial of a right to speedy trial before the Court of Appeals and the Court of Appeals' holding, unappealed by Plaintiff Yurky, granting summary judgment in favor of Defendants on Plaintiff's claim of

---

Responses to the Commonwealth Defendants' Interrogatories, filed November 18, 1982, at p. 18, no. 17. The Court may take judicial notice of the distances between the following places: between Huntingdon and Lock Haven, approximately 60 miles; between Bellefonte and Huntingdon, 40 miles; and between Lock Haven and Bellefonte, approximately 25 miles.

loss of effective assistance of counsel removes the underpinnings of a due process claim, such as was found in Cobb v. Aytch, supra. At the present time, there simply is no basis left open to Plaintiff upon which to base a claim for a hearing before an independent tribunal. Thus, unless this Court is willing to abandon its statement in the case of Olium v. Wakinekona, 103 S. Ct. 1741 (1983) that "process is not an end in itself", Olium, supra, at 103 S. Ct. 1748, the Court of Appeals should have granted Defendant Eichenlaub's summary judgment.

Accordingly, one of Yurky's attorneys (the one in Lock Haven) would have been required to travel only about one hour to visit him; the other much less. The attorney in Bellefonte would have to travel 25 miles to visit Yurky at Lock Haven and 40 miles to see him at SCIH, a difference of only about 20 miles. These differences are not comparable to those in Cobb.

Thus, the bases, legal and factual, on which the Cobb Court founded its decision were simply not present here, and Yurky cannot successfully assert a protected constitutional interest giving rise to procedural or substantive due process.

B. YURKY WAS PROVIDED WITH PROCEDURAL DUE PROCESS IN THE SENSE REQUIRED BY HEWITT V. HELMS, 459 U.S. 460, 103 S. CT. 864, 74 L.Ed. 2d 675 (1983).

It is submitted that the Cobb v. Aytch procedural requirements set forth in that case, 643 F.2d 946, 957-960, have been modified by the holding in Hewitt v. Helms, supra, as to what procedural due process is due in a prison transfer situation. What Plaintiff was entitled to in order to satisfy the due process

clause under the case of Hewitt v. Helms, supra, is: (1) Some notice of the charges against him; and (2) an opportunity to present his views to the prison officials charged with deciding whether to transfer him to administrative segregation. In the case at bar, Plaintiff did get some notice of the charges against him (that he was a security risk) by the BC-141D Form given him at the time that he arrived at SCIH. Further, Plaintiff had an opportunity on January 11 to present his opposition to the security risk matter to the Program Review Committee, the Committee established by regulation to decide what disposition should be made of an inmate upon his transfer to the institution.

In addition, an inmate must be given an opportunity to present his views to

the prison official charged with deciding whether to transfer him to administrative segregation in this case. See Hewitt v. Helms, 103 S. Ct. 864, 874. While Deputy Commissioner DeRamus made the decision to allow the transfer of Plaintiff to SCIH, it is submitted that the PRC Committee is the best instrument for allowing the Plaintiff to present his views to prison officials. Under the administrative regulations, the PRC has primary decision making power on where to place the inmate once he has arrived at the prison (see 37 Pa. Code Sec. 95.107) and is in a position to make recommendations to the Superintendent of Prisons regarding transfer of inmates. See 37 Pa. Code Sec. 95.103.

We are concerned in this case with an emergency transfer for security reasons,

where it is not necessary to have a hearing prior to transfer. See the regulations themselves and the case of Cobb v. Aytch, 643 F.2d 946 and 960 (C.A. 3, 1981) which recognizes this kind of situation. Although the Affidavit of present acting Commissioner of Corrections, Jeffes, states that it is the responsibility of transferring County officials to insure any hearing that may have been required in connection with the transfer of the inmate from a County facility to a State facility was held, this is not the Affidavit of the preparer of the memorandum, nor does it meet the emergency situation.

It is submitted that the memorandum governing emergency transfers provides for a hearing before the PRC Committee. Subsection III(F) of this memorandum is

set forth here in its entirety:

> "Emergency transfers may be approved orally by the Deputy Commissioner with all of the above procedures accomplished after-the-fact. In such cases of dire emergency, the prisoner shall be notified in writing of the transfer including the reason prior to the transfer. The required hearing procedures before the Program Review Committee, including 24 hour written notice in advance of the hearing shall be accomplished by the receiving institution in a timely manner. The inmate may waive the 24 hour advance notice in writing."

When this section is read in connection with the 24-hour Notice of Hearing provision of III(C)(1), it indicates that the question of who should hold the hearing in the case of an emergency transfer is arguably ambiguous, and, if clear either way, seems to indicate that the hearings shall be held by the PRC Committee.

There is another problem with any argument that the County warden in the

emergency transfer situation should be responsible for seeing that the hearing is held. The Helms v. Hewitt case, supra, indicates that the hearing should be held before those responsible for the decision to transfer. Warden Eichenlaub did not make the decision to transfer--he was powerless to do so. The decision was made by Deputy Commissioner DeRamus as provided in III of the Transfer Memorandum. Thus, it is submitted that the hearing should be held by prison officials at the transferee institution within the holdings of Helms v. Hewitt, supra.

While the case of Cobb v. Aytch, supra, did address in a very brief fashion the problem of emergency transfers (see 643 F.2d 946 at 961 in the context of wording of the injunction), it

is to be noted that the proper tribunal question was left open by the Court. Thus, it is submitted that Plaintiff, in fact, did receive due process concerning his transfer from CCJ to SCIH.

CONCLUSION

Defendant Eichenlaub and his successors request your Honorable Court to reverse the judgment of the Circuit Court of Appeals insofar as applicable to the Clinton County Warden and reinstate the decision of the District Court granting summary judgment in favor of Harry W. Eichenlaub.

Respectfully submitted,

CANDOR, YOUNGMAN, GIBSON & GAULT

By _____

John C. Youngman, Jr.
ATTORNEY FOR PETITIONER
23 West Third Street
Williamsport, PA 17701
(717) 322-6144

Supreme Court, U.S.
FILED
MAR 27 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-236

In the Supreme Court of the United States

OCTOBER TERM, 1985

HARRY W. EICHENLAUB, PETITIONER

v.

DAVID ALAN YURKY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

CHARLES FRIED
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

LOUIS R. COHEN
Deputy Solicitor General

ROGER CLEGG
Assistant to the Solicitor General

KAREN SKRIVSETH
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether a pretrial detainee has an automatic right under the Due Process Clause to a hearing before an independent tribunal in connection with his transfer from one custodial facility to another.

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement	2
Argument:	
A pretrial detainee has no automatic right to a hearing before an independent tribunal in connection with an inter-facility transfer for security reasons	8
Summary of argument	6
Conclusion	16

TABLE OF AUTHORITIES

Cases:

Barker v. *Wingo*, 407 U.S. 514	14
Bell v. *Wolfish*, 441 U.S. 520	7, 10, 12, 13, 14
Block v. *Rutherford*, No. 83-317 (July 3, 1984)	7, 10, 12, 14
Brewer v. *Williams*, 430 U.S. 387	13
City of Revere v. *Massachusetts General Hospital*, 463 U.S. 239	12
Cobb v. *Aytch*, 643 F.2d 946	4, 6, 9, 15
Cummings v. *Roberts*, 628 F.2d 1065	11
Feeley v. *Sampson*, 570 F.2d 364	11
Gerstein v. *Pugh*, 420 U.S. 103	6, 9
Hewitt v. *Helms*, 459 U.S. 460	5, 6, 8, 10, 11
Howe v. *Smith*, 452 U.S. 473	9
Ingraham v. *Wright*, 430 U.S. 651	12, 14
Karstendick, Ex parte, 93 U.S. 396	9
Leary v. *United States*, 395 U.S. 6	8, 14-15
Mackey v. *Montrym*, 443 U.S. 1	15
Maine v. *Moulton*, No. 84-786 (Dec. 10, 1985)	13
Martin v. *White*, 742 F.2d 469	11
Mathews v. *Eldridge*, 424 U.S. 319	15
Meachum v. *Fano*, 427 U.S. 215	7, 8, 9, 10, 15
Montanye v. *Haymes*, 427 U.S. 236	7, 9

Cases—Continued: Page

Nix v. *Whiteside*, No. 84-1321 (Feb. 26, 1986) 14
Olim v. *Wakinekona*, 461 U.S. 238 ..... 7, 9, 10, 16
Powell v. *Alabama*, 287 U.S. 45 13
Preiser v. *Rodriguez*, 411 U.S. 475 14
Procunier v. *Martinez*, 416 U.S. 396 10
Rhodes v. *Chapman*, 452 U.S. 337 10
Schall v. *Martin*, 467 U.S. 253 ..... 12, 13
Strickland v. *Washington*, 466 U.S. 668 14
Turner v. *Stumbo*, 701 F.2d 567 11
United States v. *Accetturo*, 783 F.2d 382 14
United States v. *Colombo*, 777 F.2d 96 14
United States v. *Cronic*, 466 U.S. 648 ..... 7, 14
United States v. *Goodwin*, 457 U.S. 368 ..... 8, 14
United States v. *Loud Hawk*, No. 84-1361 (Jan. 21, 1986) 7, 13, 14
United States v. *MacDonald*, 456 U.S. 1 13
United States v. *Marion*, 404 U.S. 307 13

Constitution, statutes, regulation and rule:

U.S. Const.:
Amend. VI 4, 7, 11, 15
Amend. XIV, Cl. 1 (Due Process Clause) 1, 8
18 U.S.C. 3142(f) 12
42 U.S.C. 1983 ..... 4, 5
28 C.F.R. 551.116 12
Sup. Ct. R. 40.3 2

Miscellaneous:

U.S. Dep't of Justice, *Federal Prison System Program Statement No. 7331.2* (Nov. 10, 1980) 12
U.S. Dep't of Justice, *U.S. Marshals Manual* (Sept. 1983) 12

In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-236

HARRY W. EICHENLAUB, PETITIONER

v.

DAVID ALAN YURKY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

The issue in this case is whether a pretrial detainee has an automatic right under the Due Process Clause to a hearing before an independent tribunal in connection with his transfer from one custodial facility to another. The Court's resolution of this issue may affect the rights of federal pretrial detainees, of whom several hundred are transferred each year from one facility to another (see pages 11-12 note 10, *infra*).[1]

---

[1] The court of appeals' opinion states more than once that this transfer was from a county jail to a state prison (Pet.

STATEMENT

1. On December 23, 1981, respondent was arrested in Pennsylvania on state charges of criminal conspiracy and criminal complicity. He was placed the next day in the Clinton County Jail (CCJ) in Lock Haven, Pennsylvania, a minimum security institution. Pet. App. 4a; J.A. 50. At that time, the warden, petitioner Harry Eichenlaub,[2] was informed by state police that respondent was connected with the Palestine Liberation Organization and had knowledge of the martial arts. On January 8, 1982, petitioner was also informed by state police that respondent had a passport to Lebanon, that the court planned to increase his bail from $100,000 to $300,000 because he had been charged with two additional robbery counts, and that federal bank robbery charges would be filed against him on January 10.[3] Pet. App. 4a-5a; J.A. 42, 54-55, 78.

On January 8, 1982, petitioner obtained oral approval from the Deputy Commissioner of the Pennsylvania Bureau of Correction and from the Clinton

---

App. 8a-13a); respondent's interrogatories stress this aspect of the transfer as well (J.A. 55-56, 62-63). It is not clear whether the court meant to find a protected liberty interest requiring a hearing in connection with all transfers of pretrial detainees or only in connection with transfers to institutions with a higher level of security. We believe either ruling would be error.

[2] Eichenlaub died after the petition was filed with this Court. Insofar as he was a party in his official capacity, substitution of his successor is automatic. See Sup. Ct. R. 40.3.

[3] Federal charges were never in fact filed. Respondent was convicted of the state charges on May 19, 1982, and is currently serving his prison sentence at the State Correctional Institution at Huntingdon, Pennsylvania (J.A. 47-48).

County President Judge for emergency transfer of respondent from CCJ to the State Correctional Institution at Huntingdon (SCIH),[4] on the ground that respondent posed a security risk if he remained at CCJ (Pet. App. 5a).[5] That day, respondent was transferred to SCIH, was informed in writing that he was considered a security risk, and was placed in administrative custody pending review by the Program Review Committee of the prison (*id.* at 5a-6a, 4b).

On January 11, 1982, the Program Review Committee, in accordance with state prison policy,[6] interviewed respondent and, based on the documents prepared in connection with his inter-facility transfer, determined that he should remain in administrative custody because he was a security risk (Pet. App. 6a-7a, 5b). He remained in administrative custody for 30 days before being placed in the general prison population (*id.* at 18a, 5b; see J.A. 119a, inserted between J.A. 120 and J.A. 121). His state

---

[4] Huntingdon is about 60 miles from Lock Haven (Pet. 12).

[5] An August 10, 1981, memorandum from the Commissioner of the Pennsylvania Bureau of Correction to the supervisors of county prisons and jails (J.A. 120-131) states that county prisons and jails may request transfer of an inmate to a Bureau of Correction facility for "reasons of overcrowding, security, medical purposes, or other existing conditions when the prison cannot furnish proper and sufficient accommodations for the care, custody, control, and safety of the inmates" (J.A. 120-121). A pretrial detainee is entitled under state law to notice and to a hearing if he does not consent to the transfer, but the hearing may be held by the prison's Program Review Committee after an emergency transfer (J.A. 122, 124).

[6] See August 10, 1981, memorandum (page 3 note 5, *supra*; J.A. 122, 124).

trial was held on May 18-19, 1982 (Pet. App. 5b; J.A. 47-48). During the period of administrative custody, respondent was permitted to make two telephone calls, and during his period of pretrial incarceration he was able to communicate freely with his attorneys by mail and they were free to visit him at SCIH (Pet. App. 17a-18a).

2. On May 20, 1982, respondent filed a pro se civil action pursuant to 42 U.S.C. 1983 in the United States District Court for the Middle District of Pennsylvania, alleging that petitioner, the warden and deputy warden of SCIH, and others had violated several of his federal constitutional rights (J.A. 22-36). In particular, he claimed that his transfer from CCJ to SCIH violated procedural due process; that his assignment to administrative custody violated his procedural and substantive due process rights; and that his detention at SCIH denied him his Sixth Amendment right to effective assistance of counsel (J.A. 22-36; Pet. App. 5b-6b). He sought compensatory and punitive damages from the offending officials and an "[i]njunction against future transfer of pre-trial detainees to [SCIH]" (J.A. 26-27).

The district court granted petitioner's motion for summary judgment. The court rejected respondent's claim that he was denied procedural due process by the inter-facility transfer because the Program Review Committee told him only that he was transferred as a security risk without informing him of the underlying reasons for that determination (Pet. App. 6b-10b). The court found that the notice provided met the requirements of *Cobb* v. *Aytch*, 643 F.2d 946, 961 (3d Cir. 1981) (en banc), on which

respondent had relied (Pet. App. 9b-10b). The court found, moreover, that in any event respondent's inter-facility transfer did not deprive him of any federally protected right (*id.* at 11b-12b). In this regard, the court found that petitioner had a rational basis for the emergency transfer of respondent to the state facility and that petitioner had followed well-defined procedures in accomplishing that end.[7] The court also found that the transfer did not deny respondent the right to effective assistance of counsel, because he was able to communicate with his attorney while at SCIH (*id.* at 18b-19b).

The district court also rejected respondent's challenges to his placement in administrative custody (Pet. App. 12b-18b). The court found that, although respondent did, under the principles of *Hewitt* v. *Helms*, 459 U.S. 460 (1983), acquire a liberty interest in remaining in the general prison population, he received sufficient notice and hearing to meet procedural due process requirements (Pet. App. 12b-15b). The court also found that respondent's assignment to administrative custody did not violate any substantive due process right because it was consistent with Pennsylvania regulations concerning the use of administrative custody pending determination of an appropriate security classification (*id.* at 15b-18b).

3. The court of appeals vacated the district court's decision in part and remanded (Pet. App. 1a-20a).

---

[7] The court also dismissed this claim against the warden and deputy warden of SCIH, finding that they had no authority to bar respondent's transfer and so could not be sued under 42 U.S.C. 1983 with regard to that transfer (Pet. App. 11b-12b).

The question whether respondent was entitled to a hearing before a tribunal independent of the prison system rather than before the Program Review Committee was not addressed by the district court.

It held that, under *Cobb* v. *Aytch*, *supra*, a pretrial detainee's transfer from a county jail to a state prison implicates a federal constitutional liberty interest and that respondent was entitled to, but had not received, a prompt post-transfer hearing before an independent tribunal after his emergency transfer (Pet. App. 8a-10a). The wrongful denial, the court stated, was petitioner's responsibility (*id.* at 10a-13a). However, the court of appeals affirmed the district court's judgment that respondent had not been denied effective assistance of counsel (*id.* at 17a-18a).

The court of appeals also found that respondent had a protected liberty interest under *Hewitt* v. *Helms*, *supra*, in remaining in the general prison population and that the district court had erred in finding that respondent had sufficient notice of the charges that resulted in his placement in administrative custody and sufficient opportunity to defend against them (Pet. App. 13a-17a).[8]

SUMMARY OF ARGUMENT

1. A defendant who is properly detained pending trial (see *Gerstein* v. *Pugh*, 420 U.S. 103 (1975)) does not have any general liberty interest in not being transferred from one detention facility to another. Just as a convicted inmate has no protected expectation that he will be incarcerated in (or will

[8] No further review has been sought on the administrative custody issue, which is now on remand to the district court. The court of appeals also remanded "to the District Court for its determination of whether to grant [Respondent's] Motion for Partial Summary Judgment and/or whether to hold a trial on any of the issues raised in the pleadings, such as issues of liability, qualified immunity, and damages" (Pet. App. 19a-20a).

remain in) any particular prison, a properly detained criminal defendant has no protected expectation that he will be sent to any particular facility in the first instance, nor does the fact that he was initially assigned to one facility create a protected expectation that he will remain here. Cf. *Olim* v. *Wakinekona*, 461 U.S. 238 (1983); *Montanye* v. *Haymes*, 427 U.S. 236 (1976); *Meachum* v. *Fano*, 427 U.S. 215 (1976). Prison authorities have historically been free to house both convicted defendants and pretrial detainees in any facility permitted by applicable statutes and regulations, and the courts have traditionally declined to interfere with custodial authorities in their exercise of discretion in such matters, particularly as such discretion relates to security. Cf. *Block* v. *Rutherford*, No. 83-317 (July 3, 1984); *Bell* v. *Wolfish*, 441 U.S. 520, 540, 546-547 (1979).

2. Pretrial detainees do, of course, have specific rights that may not be violated by a transfer. Pretrial detainees may not be "punished" and must be afforded the rights, particularly as guaranteed by the Sixth Amendment, necessary to ensure a fair trial. But these rights do not generate a general liberty interest in where defendant is detained and do not require a transfer hearing before an independent tribunal in every instance. Whether a defendant is being punished or has been denied his right to effective assistance of counsel or a speedy trial must be determined on the facts of each case. See, *e.g.*, *United States* v. *Loud Hawk*, No. 84-1361 (Jan. 21, 1986) (speedy trial); *Block* v. *Rutherford*, *supra* (punishment); *United States* v. *Cronic*, 466 U.S. 648 (1984) (effective assistance of counsel); *Bell* v. *Wolfish*, *supra* (punishment). Such determinations may be made administratively, upon petition for writ

of habeas corpus, in a separate suit, or at or after trial, as appropriate. There is no reason to suppose, and it would be greatly disruptive to assume, that all transfers of detainees so threaten one or more of these rights as to require a hearing before an independent tribunal. Cf. *United States* v. *Goodwin*, 457 U.S. 368, 380-384 (1982); *Leary* v. *United States*, 395 U.S. 6 (1969).

Here, respondent failed to demonstrate a violation of any substantive right. The lower courts did not find, and there is no reason to suppose, that his transfer effected punishment or was not for a legitimate—here, a security—purpose. There is no allegation that the conditions of confinement were improper or that the right to a speedy trial was infringed. Finally, the district court and court of appeals both found that respondent was not denied the effective assistance of counsel.

ARGUMENT

A PRETRIAL DETAINEE HAS NO AUTOMATIC RIGHT TO A HEARING BEFORE AN INDEPENDENT TRIBUNAL IN CONNECTION WITH AN INTER-FACILITY TRANSFER FOR SECURITY REASONS

1. The court of appeals ruled that respondent was entitled to a hearing before an independent tribunal because he had a liberty interest in not being transferred from one facility to another. This, we submit, was error: there is no general liberty interest in being detained in, or remaining in, a particular facility. A liberty interest protected by the Due Process Clause may be derived from the Clause itself or from state law. *Hewitt* v. *Helms*, 459 U.S. 460, 466 (1983); *Meachum* v. *Fano*, 427 U.S. 215, 223-227 (1976). But the decision below is not based on any Pennsylvania state law liberty interest in being de-

tained in a particular facility.[9] And just as a convicted defendant has no federal constitutional right to be imprisoned in a particular facility or not to be transferred to another facility—see, *e.g.*, *Olim* v. *Wakinekona*, 461 U.S. 238 (1983); *Montanye* v. *Haymes*, 427 U.S. 236 (1976); *Meachum* v. *Fano*, *supra*; *Ex parte Karstendick*, 93 U.S. 396, 400, 404 (1876); cf. *Howe* v. *Smith*, 452 U.S. 473 (1981)—so a pretrial detainee should not be deemed to have a general right to be placed, or to remain, in a particular facility.

A judicial officer having found probable cause that a defendant committed a crime, the state may detain him. See *Gerstein* v. *Pugh*, 420 U.S. 103, 114, 116-117 n.18, 117 n.19, 119 (1975). In this case, the district court found that respondent was validly detained pending his trial (Pet. App. 9b), and the court of appeals did not disturb this finding. Accordingly, respondent's initial confinement at CCJ was valid.

This Court has repeatedly held that prison officials holding convicted prisoners and pretrial detainees have broad discretion to take security measures without judicial review. "[T]o hold * * * that *any* substantial deprivation imposed by prison authorities triggers the procedural protections of the Due Process Clause would subject to judicial review a wide spectrum of discretionary actions that traditionally have

---

[9] The Third Circuit stated in *Cobb* v. *Aytch*, 643 F.2d 946, 953-957 (1981) (en banc), that in Pennsylvania a convicted prisoner has no state-created liberty interest in remaining in the same facility; the court in that case did not disturb the trial judge's finding that pretrial detainees had no such state law interest either. In the present case, it is unclear whether the court of appeals found such a state law right (see Pet. App. 9a n.1), but the court plainly did not rely on such an interest. Cf. *Olim* v. *Wakinekona*, 461 U.S. 238, 244 n.5 (1983).

been the business of prison administrators rather than of the federal courts." *Meachum* v. *Fano*, 427 U.S. at 225 (emphasis in original) (convicted prisoners). "[A] prison's internal security is peculiarly a matter normally left to the discretion of prison administrators." *Rhodes* v. *Chapman*, 452 U.S. 337, 349 n.14 (1981) (convicted prisoners). "[L]imited restriction[s] [are] * * * a rational response by prison officials to * * * obvious security problem[s]" (*Bell* v. *Wolfish*, 441 U.S. at 550) (pretrial detainees), and have been consistently upheld for convicted and unconvicted inmates alike in the face of a variety of constitutional claims. The Court has "repeatedly said both that prison officials have broad administrative and discretionary authority over the institutions they manage and that lawfully incarcerated persons retain only a narrow range of protected liberty interests." *Hewitt* v. *Helms*, 459 U.S. at 467. See also *Olim* v. *Wakinekona*, 461 U.S. at 245; *Procunier* v. *Martinez*, 416 U.S. 396, 405 (1974).

This Court has recognized that pretrial detainees may pose security problems equal to those posed by convicted prisoners and that dealing with these problems is a matter over which prison officials have broad discretion. *Block* v. *Rutherford*, No. 83-317 (July 3, 1984); *Bell* v. *Wolfish*, 441 U.S. 520, 540, 546-547 (1979). In *Wolfish*, the Court stated, "There is no basis for concluding that pretrial detainees pose any lesser security risk than convicted inmates. Indeed, it may be that in certain circumstances they present a greater risk to jail security and order." 441 U.S. at 546 n.28. The security concerns to which this Court has referred in holding that prison officials must have broad discretion in maintaining safety and order in prisons (see, *e.g.*, *Hewitt* v. *Helms*, 459 U.S.

at 467-468, 472-473) are, therefore, applicable to pretrial detainees as well.

Since respondent had been validly detained pending trial, and since he plainly had no inherent constitutional right to be detained in any particular institution in the first instance, it follows that his initial detainment at one facility could not give him a protected general liberty interest in remaining in a facility that the authorities believed was not secure enough for him. On the contrary, the custodial officials had an obligation to the other prisoners at the jail, to its guards, and to the general public to exercise their discretion to protect others against respondent's potential dangerousness. See, *e.g.*, *Martin* v. *White*, 742 F.2d 469 (8th Cir. 1984). Other courts of appeals have approved transfers of pretrial detainees without hearings where the transfers were for legitimate government reasons. See, *e.g.*, *Turner* v. *Stumbo*, 701 F.2d 567, 570-572 (6th Cir. 1983); *Cummings* v. *Roberts*, 628 F.2d 1065, 1069 (8th Cir. 1980); *Feeley* v. *Sampson*, 570 F.2d 364, 376-377 (1st Cir. 1978).

2. Pretrial detainees do, of course, have specific rights that may not be violated by a transfer. Pretrial detainees may not be "punished" and must be afforded the rights, particularly as guaranteed by the Sixth Amendment, necessary to ensure a fair trial. But any alleged violation of a specific right can be adjudicated at trial or in another proceeding addressed to the specific claim. There is no need for automatic review by an independent tribunal of every inter-facility transfer on the speculation that a specific right may be violated.[10]

---

[10] Any requirement that a hearing be held by an independent tribunal in connection with every transfer of a pretrial

The primary constitutional difference between the conditions under which pretrial detainees and convicted prisoners may be confined is that a pretrial detainee may not be detained for the purpose of punishment. See *Block* v. *Rutherford*, slip op. 7; *Schall* v. *Martin*, 467 U.S. 253, 269 (1984); *City of Revere* v. *Massachusetts General Hospital*, 463 U.S. 239, 244 (1983); *Bell* v. *Wolfish*, 441 U.S. at 535 & n.16 (1979); *Ingraham* v. *Wright*, 430 U.S. 651, 671-672 n.40 (1977). He may, however, be detained for the purpose of securing his appearance in court, protecting the judicial process against obstruction, and protecting the public against further dangerous criminal activity. See, *e.g.*, 18 U.S.C. (Supp. II) 3142(f);

---

detainee would have a substantial impact on federal, state, and local custodial systems and on the courts. According to the Bureau of Prisons, in fiscal year 1984, 229 unsentenced (pretrial and posttrial) detainees were transferred between federal facilities a total of 298 times, and in fiscal year 1985, 330 such detainees were transferred 430 times. In the federal system, moreover, pretrial detainees historically were housed primarily in local jail facilities while awaiting trial (U.S. Dep't of Justice, *Federal Prison System Program Statement No. 7331.2*, § 1 note (Nov. 10, 1980); U.S. Dep't of Justice, *U.S. Marshals Manual* § 8.12-1(b) (Sept. 1983)); today, more than half of federal pretrial detainees are still housed in state and local facilities under contract with the United States Marshals Service. Figures on the number of transfers involving federal prisoners in state and local facilities are unavailable, but these transfers occur regularly (for a variety of purposes) and number substantially more than the intrafederal transfers. The Marshals Service has no provision for notice and hearing regarding transfer of a pretrial detainee within the institution or to another institution; the Bureau of Prisons provides for hearing only in certain instances (none common), such as when a pretrial detainee is charged with a violation of institution rules (28 C.F.R. 551.116).

Schall v. *Martin*, 467 U.S. at 264-274; *Bell* v. *Wolfish*, 441 U.S. at 533-534, 537, 539. As this Court explained in *Bell* v. *Wolfish*, 441 U.S. at 539 (citation and footnote omitted):

> [I]f a particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to "punishment." Conversely, if a restriction or condition is not reasonably related to a legitimate goal—if it is arbitrary or purposeless—a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees *qua* detainees.

In addition, a pretrial detainee is, like anyone charged with a crime, entitled under the Sixth Amendment to reasonable access to counsel in order to prepare his defense (see *Maine* v. *Moulton*, No. 84-786 (Dec. 10, 1985), slip op. 8-10; *Brewer* v. *Williams*, 430 U.S. 387, 398-399 (1977); *Powell* v. *Alabama*, 287 U.S. 45 (1932)) and to a speedy trial (see *United States* v. *Loud Hawk*, No. 84-1361 (Jan. 21, 1986), slip op. 7-8; *United States* v. *MacDonald*, 456 U.S. 1, 8 (1982); *United States* v. *Marion*, 404 U.S. 307, 320 (1971)).

It is possible, of course, that in a particular instance the transfer of a pretrial detainee will effect a violation of a specific right—will punish him, delay his trial, or deny him effective assistance of counsel. But no specific right of respondent was violated here, and the hearing itself should not have been made a matter of substantive right.

There is no reason to presume that an inter-facility transfer will have more than a de minimis effect on the detainee's conditions of confinement or that it

will be made for other than legitimate (often security or overcrowding) reasons. See *Block* v. *Rutherford*, slip op. 7; *Bell* v. *Wolfish*, 441 U.S. at 537-540 & n.21, 542-543 & n.25; cf. *Ingraham* v. *Wright*, 430 U.S. at 674. An automatic hearing is, moreover, unnecessary to protect the rights of a particular detainee who believes he is being punished.[11]

Similarly, the courts can provide remedies for interference with the right to counsel and the right to a speedy trial wherever actual interference with those rights has occurred, but should not intervene in broad theoretical anticipation of such interference. See, *e.g.*, *Nix* v. *Whiteside*, No. 84-1321 (Feb. 26, 1986) (effective assistance of counsel); *United States* v. *Loud Hawk*, *supra* (speedy trial); *Block* v. *Rutherford*, *supra* (punishment); *Strickland* v. *Washington*, 466 U.S. 668, 690 (1984) (effective assistance of counsel); *United States* v. *Cronic*, 466 U.S. 648, 657-662 (1984) (effective assistance of counsel); *Barker* v. *Wingo*, 407 U.S. 514 (1972) (speedy trial); *Bell* v. *Wolfish*, *supra* (punishment). See also *United States* v. *Colombo*, 777 F.2d 96, 100-101 (2d Cir. 1985). There is no reason to require a hearing in connection with every inter-facility transfer in anticipation of a wrong that has not been alleged, much less shown. Cf. *United States* v. *Goodwin*, 457 U.S. 368, 380-384 (1982); *Leary* v. *United States*, 395

---

[11] The pretrial detainee faced in a particular case with the denial of a constitutional right will not be without recourse. He may invoke administrative remedies, file a motion for a pretrial order from the trial judge, seek a writ of habeas corpus, or file a separate action. See *Preiser* v. *Rodriguez*, 411 U.S. 475 (1973); cf. 18 U.S.C. 3164(c); *United States* v. *Accetturo*, 783 F.2d 382 (3d Cir. 1986); *United States* v. *Colombo*, 777 F.2d 96 (2d Cir. 1985).

U.S. 6 (1969). See also *Mackey* v. *Montrym*, 443 U.S. 1, 14 (1979) (citation omitted) (the procedures required by due process "must be shaped by 'the risk of error inherent in the truthfinding process as applied to the generality of cases' rather than the 'rare exceptions' "); *Mathews* v. *Eldridge*, 424 U.S. 319, 344 (1976) (same). The rights of pretrial detainees can be protected on a case-by-case basis.

Here there is no evidence that the purpose of respondent's transfer was punitive or was not the asserted, legitimate government purpose of prison security.[12] Respondent did not allege that his transfer denied him the right to a speedy trial. Although he claimed below that the transfer resulted in the deprivation of his Sixth Amendment right to effective assistance of counsel, both the district court and the court of appeals rejected the claim and he did not cross-petition for certiorari on the issue here.[13] Thus, "[t]he predicate for invoking the protection of the Fourteenth Amendment * * * is totally nonexistent in this case." *Meachum* v. *Fano*, 427 U.S. at 227. Without this predicate, respondent's due process claim cannot stand. "Process is not an end in itself. Its constitutional purpose is to protect a substantive

---

[12] See, *e.g.*, Pet. App. 11b. Respondent asserted in his complaint (J.A. 31, 32, 35-36) that the transfer "punished" him without due process, but he has apparently never elaborated on this assertion.

[13] The court of appeals relied on its earlier decision in *Cobb* v. *Aytch*, 643 F.2d 946 (3d Cir. 1981) (en banc), in holding that respondent had been denied due process. In *Cobb*, however, the court found actual violations of the Sixth Amendment right to counsel, an allegation explicitly rejected by both the district court and the court of appeals in this case. (The court in *Cobb* did, however, grant broad injunctive relief in the class action there.)

interest to which the individual has a legitimate claim of entitlement." *Olim* v. *Wakinekona*, 461 U.S. at 250 (citation omitted). Here, respondent has no legitimate claim of entitlement to protect a substantive interest, and hence no claim that he was denied due process.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted.

CHARLES FRIED
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

LOUIS R. COHEN
Deputy Solicitor General

ROGER CLEGG
Assistant to the Solicitor General

KAREN SKRIVSETH
Attorney

MARCH 1986

☆ U. S. GOVERNMENT PRINTING OFFICE: 1986 491507 20175

Supreme Court, U.S.
FILED
APR 24 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-236

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

HARRY EICHENLAUB,

Petitioner,

v.

DAVID ALAN YURKY,

Respondent.

MEMORANDUM OF RESPONDENT, DAVID ALAN YURKY, SUGGESTING MOOTNESS

DAVID RUDOVSKY
First Assistant Defender
Defender Association of Philadelphia
121 N. Broad Street
Philadelphia, PA 19107
(215) 568-3190

PRESS OF RAM PRINTING, HYATTSVILLE, MD 20781 (301) 864-6662

Respondent, David Alan Yurky, by his counsel, David Rudovsky, respectfully submits this Memorandum of Respondent, David Alan Yurky, Suggesting Mootness to advise the Court of certain facts which in Respondent's view render this cause moot:

1. On August 8, 1985, Petitioner filed a Petition for Writ of Certiorari in this Court. The Writ was granted on January 13, 1986, on the issue of whether Petitioner violated Respondent's rights to due process of law by his transfer from a County Prison to a State Correctional Institution without a hearing.

2. At the time that the Petition for Writ of Certiorari was filed, petitioner Harry Eichenlaub was deceased, having died on July 13, 1985. See Brief for Petitioner, 1, n.1. This fact was unknown to Respondent until the filing of Petitioner's Brief (March 27, 1986), and apparently was not called to this Court's attention until that time.

3. No substitution by a proper representative of the deceased was made within six months of petitioner's death; accordingly, unless the automatic substitution provisions of Rule 40 of the Court are applicable, this case abates as a matter of law. Rule 40.1.

4. This action has been litigated as a damages claim against Harry Eichenlaub in his personal capacity under 42 U.S.C. Section 1983. J.A. 26-27. The theory of this case is that petitioner violated Respondent's rights to due process of law under the Fourteenth Amendment by depriving him of a hearing in connection with his transfer to a state prison facility. Any damages for this violation can be assessed solely against petitioner and not his successor in office or the employer-county (which is not a party to the suit). No claim has been made that petitioner acted in accord with official governmental policy. See *Kentucky* v. *Graham*, 473 U.S. ___, 105 S.Ct. 3099 (1985); *Monell* v. *New York City Dept. of Social Services*, 436 U.S. 658

(1978); *Rizzo* v. *Goode*, 423 U.S. 362 (1976). Cf. *Bender* v. *Williamsport Area School District*, No. 84-773 (March 25, 1986). As the Court stated in *Kentucky* v. *Graham*, *supra*, 105 S.Ct. at 3105:

> Personal-capacity suits seek to impose personal liability upon a government official for actions he takes under color of state law. See, e.g., Scheuer v. Rhodes, 416 U.S. 232, 237-238 (1974). Official-capacity suits, in contrast, "generally represent only another way of pleading an action against an entity of which an officer is an agent." Monell v. New York City Dept. of Social Services, 436 U.S. 658, 690, n.55 (1978) . . . Thus, while an award of damages against an official in his personal capacity can be executed only against the official's personal assets, a plaintiff seeking to recover on a damages judgment in an official-capacity suit must look to the government entity itself.

This is not an official capacity suit and no automatic substitution for petitioner Eichenlaub can be effected under Rule 40.

WHEREFORE, Respondent Yurky suggests that this case is moot. Respondent moves this Court to enter an Order pursuant to Rule 40 that the matter is abated and that certiorari was improvidently granted. In the alternative, the Court should defer consideration of this issue to the hearing of the case on the merits, and to order any supplemental briefing that may be appropriate.

Respectfully submitted,

DAVID RUDOVSKY
First Assistant Defender
Defender Association of Philadelphia
121 N. Broad Street
Philadelphia, PA 19107
(215) 568-3190

Supreme Court, U.S.
FILED
APR 25 1986
JOSEPH F. SPANIOL, JR.
CLERK

NO. 85-236

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

HARRY EICHENLAUB, Warden Clinton County Jail
Petitioner

v.

DAVID ALAN YURKY, MR. ZIMMERMAN, Warden SCI at Huntingdon, MR. WICKER, Deputy Superintendent SCI at Huntingdon,
Respondents

MEMORANDUM OF PETITIONER HARRY W. EICHENLAUB IN OPPOSITION TO MEMORANDUM OF RESPONDENT SUGGESTING MOOTNESS

JOHN C. YOUNGMAN, JR.
Counsel of Record
CANDOR, YOUNGMAN, GIBSON & GAULT
23 West Third Street
P.O. Box 1507
Williamsport, PA 17703
(717) 322-6144
Counsel for Petitioner

AMY ZAPP, Deputy Attorney General
Office of Attorney General
Criminal Justice Agencies
1512 Strawberry Sq.
Harristown Bldg. #1
Harrisburg, PA 17102
(717) 783-1471
Counsel for Mr. Wicker & Mr. Zimmerman

DAVID RUDOVSKY
Counsel of Record
10th Floor
121 North Broad Street
Philadelphia, PA 19107
(215) 568-3190
Counsel for David Alan Yurky

Petition for Certiorari filed August 8, 1985
Certiorari granted January 13, 1986

TABLE OF AUTHORITIES

Page

CASES

Edelman v. Jordan, 415 U.S. 651, 94 S. Ct. 1347, 39 L.Ed. 2d 622 (1974)..... 5

Griffin v. County School Board, 377 U.S. 218, 84 S. Ct. 1226, 12 L.Ed. 2d 256 (1964)..... 5

Kentucky v. Graham, 105 S. Ct. 3099 (1985)..... 3

Lincoln County v. Luning, 133 U.S. 529, 10 S. Ct. 363, 33 L.Ed. 766 (1890)..... 5

McSurely v. McClellan, 753 F.2d 88 (C.A.D.C. 1985)..... 7

Moor v. County of Alameda, 411 U.S. 693, 93 S. Ct. 1785, 36 L.Ed. 2d 596 (1973)..... 5

Polk County v. Dodson, 454 U.S. 312, 102 S. Ct. 445, 70 L.Ed. 2d 509 (1981)..... 6

Rende v. Kay, 415 F.2d 983 (C.A.D.C. 1969)..... 7

Rizzo v. Goode, 423 U.S. 362, 561 (1976)..... 6

STATUTES

61 P.S. §409..... 4

RULES

Federal Rule of Appellate Procedure 43(a)..... 2,7

Federal Rule of Civil Procedure 25(a)..... 7

Supreme Court Rule 40.1..... 2

NO. 85-236

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

HARRY EICHENLAUB, Warden Clinton County Jail
Petitioner

v.

DAVID ALAN YURKY, MR. ZIMMERMAN, Warden SCI at Huntingdon, MR. WICKER, Deputy Superintendent SCI at Huntingdon,
Respondents

MEMORANDUM OF PETITIONER HARRY W. EICHENLAUB IN OPPOSITION TO MEMORANDUM OF RESPONDENT SUGGESTING MOOTNESS

Respondent, Harry W. Eichenlaub and his successor Arwyn Reish and the Estate of Harry W. Eichenlaub to be substituted by their counsel, Candor, Youngman, Gibson & Gault, respectfully submits this Memorandum of Petitioner in opposition to

the suggestion of mootness by the Respondent in the above captioned matter, and advises the Court of facts as follows:

1. The suit of Respondent requested in addition to damage relief, injunctive relief (J.A. 27).

2. Harry W. Eichenlaub's death occurred before the Petition for Certiorari was filed in this Court. As such, the matter of substitution is not provided for in Supreme Court Rule 40.1. Rather, the matter of substitution is controlled by Federal Rule of Appellate Procedure 43a, which provides that substitution is to be effected after the notice of appeal is filed in accordance with 43a. Rule 43a does not provide for abatement of the action.

3. A Motion is being made to the Third Circuit Court of Appeals to substitute the Estate of Harry W. Eichenlaub for Harry W. Eichenlaub as Petitioner with respect to the personal liability.

4. Harry W. Eichenlaub, as Warden of Clinton County Jail, was an employee of Clinton County, and enunciated the policy of Clinton County with respect to having post-transfer independent tribunal hearings in the case of transferred prisoners. As such, the action was an official capacity suit because an administrative policy was involved. Kentucky v. Graham, 105 S. Ct. 3099 (1985).

5. By Opinion of the Attorney General of Pennsylvania of 1971, No. 55, which is attached hereto and marked as Exhibit "A", the warden at a County pri-

son has power to make rules and regulations for the government and management of the prison in the safekeeping, discipline and employment of the prisoners as may be deemed necessary, construing 61 P.S. §409.[1]

6. Eichenlaub, in transferring Yurky, acted in his official capacity as Warden of the prison, and as such as an official of Clinton County, Pennsylvania.

---

[1]61 P.S. §409 provides as follows: "That, within thirty days after this act shall become effective in any county, the above-named board shall meet and organize by the election of a president and secretary. A majority of the members of said board shall constitute a quorum for the transaction of business, and all actions of said board must be by the approval of a majority of all the members of said board. The board shall meet monthly, or oftener if required, and keep regular minutes of their proceedings in a book, to be filed with the financial records of each of said counties, and shall make such rules and regulations for the government and management of the prison,

7. The action is not barred by the Eleventh Amendment since the State will not pay the money damages in this case, but they will be paid by Clinton County. See Edelman v. Jordan, 415 U.S. 651, 94 S. Ct. 1347, 39 L.Ed. 2d 662 (1974); Lincoln County v. Luning, 133 U.S. 529, 10 S. Ct. 363, 33 L.Ed. 766 (1890); Moor v. County of Alameda, 411 U.S. 693, 93 S. Ct. 1785, 36 L.Ed. 2d 596 (1973); Griffin v. County School Board, 377 U.S. 218, 84 S. Ct. 1226, 12 L.Ed. 2d 256 (1964).

---

and the safekeeping, discipline, and employment of the prisoners, as may be deemed necessary. Such meetings shall be held at the prison no less than quarterly. The board shall appoint a warden of the prison. The warden, subject to the approval of the board, may appoint such deputy or deputies, assistant or assistants, keeper or keepers, as may be required in the taking care of the prison. The number and compensation of such deputies, assistants, or keepers shall be

8. This case is not controlled by the case of Rizzo v. Goode, 423 U.S. 362, 96 S. Ct. 598, 46 L.Ed. 2d 561 (1976) inasmuch as the Plaintiff was affected in his own rights by the policy of Clinton County and seeks injunctive relief for the future. See Polk County v. Dodson, 454 U.S. 312, 102 S. Ct. 445, 70 L.Ed. 2d 509 (1981).

9. Eichenlaub was acting in his official capacity in denying the post-transfer hearing.

10. Eichenlaub's position and the position of the County in this suit is that Petitioner is not entitled to a post-transfer independent tribunal hearing.

---

fixed by the salary board." This statute has been amended since 1971; however, the statute has not been amended concerning the powers and duties of the warden of the prison.

11. Petitioner claims denial of his Fourteenth Amendment rights to due process as part of his claim.

12. The case of McSurely v. McClellan, 753 F.2d 88 (C.A.D.C. 1985), sets forth how substitution is to be effected. Said substitution may be effected by Plaintiff at this time, either in accordance with F.R.A.P. 43(a) or in accordance with F.R.C.P. 25(a). See also Rende v. Kay, 415 F.2d 983 (C.A.D.C. 1969).

WHEREFORE, the case is not moot, has not abated and substitution of the Administrator of the Estate of Harry Eichenlaub is proceeding.

CANDOR, YOUNGMAN, GIBSON & GAULT

By _____
John C. Youngman, Jr., Esquire
Attorneys for Petitioner

EXHIBIT "A"

OFFICIAL OPINION NO. 55,

Prisoners—Furloughs—Inmates of county prisons.

1. 19 P. S. § 1179.1 provides that persons sentenced to county jails may be permitted upon an order of the court, to leave the jail during necessary and reasonable hours for the purpose of working at their employment, but states nothing about authorizing furloughs for other purposes.

2. 61 P. S. § 409 authorizes the Warden of the County Prison to make rules and regulations for the Government and Management of the Prison, but is not broad enough to permit the Warden to grant furloughs.

Harrisburg, Pa.,
August 5, 1971

Major John D. Case
Warden
Bucks County Prison
Doylestown, Pennsylvania 18901

Dear Warden Case:

Sometime ago you discussed with me the question of whether you are authorized by present law to grant furloughs to inmates in your institution.

19 P. S., § 1179.1, provides that persons sentenced to county jails may be permitted to leave the jail during necessary and reasonable hours for the purpose of working at their employment, conducting their own business or other self-employed occupation, including, in the case of a woman, housekeeping and attending to needs of her family, seeking employment, attendance at an educational institution or securing medical treatment. This permission may be granted to an inmate upon an order of the Court. This statute says nothing about authorizing furloughs for other purposes. 61 P. S., § 409, authorizes the warden of a county prison to make rules and regulations for the government and management of the prison and the safekeeping, discipline and employment of the prisoners as may be deemed necessary. This section might possibly be construed to permit furloughs by the warden, but it is my judgment that you are not authorized by this section to permit furloughs. You will note that 61 P. S. § 1052(b), which governs the Bureau of Correction, provides for wider latitude in permitting release or furloughs of inmates.

In view of this I think it would be well for us to seek legislation giving the warden of county prisons expanded authority with regard to furloughs.

Very truly yours,

J. SHANE CREAMER,
Attorney General.